85-672

NO. _____

Supreme Court, U.S.
FILED
OCT 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

N THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

LARRY COHRAN,

Petitioner,

vs.

STAN CARLIN and MARGARET A. CARLIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT OF PETITIONER
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) When a Supreme Court of a State refuses to follow Statutes and case law which provide an unambiguous written contract may not be varied by oral agreement, particularly where the written contract is attached to the Complaint which Complaint asserts an oral agreement contrary to the public policy, was Petitioner's rights to equal protection of law and due process guaranteed by the Fourteenth Amendment of the United States Constitution violated even though Petitioner had earlier been placed in default, before trial, by having his answer stricken?

(2) Where Petitioner's argument and citation of authority in his Brief submitted to the Supreme Court of the State below addresses errors complained of, does an opinion of the State Supreme Court stating that the errors were not addressed, and thus abandoned violate Petitioner's right to due process and equal protection of the guarantees of the Fourteenth

Amendment to the Constitution of the United States?

(3) Whether by Petitioner's asserting a State Statute and Constitutional provision similar to, but not identical to the Fifth Amendment of the United States Constitution which Statute provides that no party shall be required to discovery matters tending to criminate himself, expose himself to a penalty or forfeiture of his estate or bring infamy or disgrace or public contempt upon himself or any member of his family, when certain questions are first asked, waives Petitioner's right to later assert the Fifth Amendment after he had been ordered to answer?

(4) Where Petitioner has asserted the general provisions of said State Statute and Constitutional provision in refusing to answer certain questions and the state courts have failed to address the appropriateness of these assertions and without affording an opportunity

where the Federal Constitutional claims could be raised, can the state courts then penalize the Petitioner by striking his defensive pleadings resulting in a judgment against him for over One Million Dollars and order him incarcerated in jail until he answers said questions?

(5) Whether Petitioner, a lawyer, whose answer had been stricken for failure to answer discovery is denied equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States by the lower court's refusal to invoke the "clean hands" doctrine when Petitioner's former client, a twice convicted felon, brought a malpractice case against Petitioner claiming Petitioner has refused to consumate an oral employment contract for the Petitioner to corrupt the judiciary, hide assets from the former client's creditors and conceal money stolen by the former client's and the court allows the case to go to a jury which awarded over one million dollars

was against the lawyer in a default action?

(6) Was Petitioner denied due process and equal protection of the laws guaranteed by the Fourteenth Amendment by of the United States Constitution by the state courts refusal to allow Petitioner to prosecute his compulsory counter-claim against the plaintiffs when Petitioner had continuously insisted upon his rights to do so but the courts denied said right based upon the proposition that the defendant's defensive pleadings were stricken by the trial court?

(6) Is a lawyer is entitled to the same rights and immunities under the law as the general public?

(7) Was the courts refusal to allow the a continuance of the trial of the case based upon the fact that defendant had obtained a stay by the appeallate court that was vacated without notice to the Petitioner and the trial of the case was started without Petitioner being

present for two days of the trial over objections by Petitioner's counsel is a violation of the due process clause of the Fourteenth Amendment by denying the Petitioner the right to defend against said action in person and to have effective assistance of counsel?

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STANDING ORDER OF COURT OF APPEALS.....12

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States.

The petitioner, LARRY COHRAN, prays that a Writ of Certiorari issue to review the Order and Judgment of the Supreme Court of Georgia, entered on June 19, 1985, and the denial of a timely motion for a rehearing, entered on July 23, 1985, and of the State Courts of Georgia as hereinafter set forth.

OPINIONS BELOW

Supreme Court's Denial of Motion for Rehearing and Dissent on July 23, 1985. [A 1-3].

Supreme Court's Order vacating Rule 59 opinion of February 8, 1985, and substituting opinion of June 19, 1985, affirming judgment of trial court and dissent. [B 1-22].

Supreme Court's Rule 59 opinion of February

8, 1985, and dissent. [C 1].

Appellant's request to allow additional pages on appellant brief made on December 3, 1984 with no ruling made thereon. [D 1].

Appellant's Brief and Enumeration of Errors dated December 5, 1984. [E 1-43].

Order of trial court denying Motion JNOV filed December 7, 1983. [F 1-2].

Judgment of trial court filed June 23, signed June 20, nunc pro tunc June 16, 1983. [G 1-3].

Jury Verdict of June 16, 1983. [H 1-2].

Complaint of Plaintiffs and written employment attached as attachment filed August 23, 1979. [I 1-33].

Transcript of portions of hearing on objection to proceedings in trial, non-allowance of counterclaim and failure to allow defendant to participate in trial. [J 1-6].

Defendant's Motion for Judgment on Pleadings as to Count I of Plaintiff's Complaint filed October 22, 1979. [K 1-2].

Defendant's Motion for Judgment on Pleadings as to count II of Plaintiff's Complaint filed October 22, 1979. [L 1-2].

Order of trial court filed May 8, 1981, denying defendant's Motion for Judgment on Pleadings Count I & II converted into Motion for Summary Judgment. [M 1-2].

Order of trial court filed May 8, 1981, granting third party Motion to Dismiss or in the alternative Motion for Summary Judgment. [N 1-2].

Order of trial court filed May 8, 1981, requiring defendant to answer certain questions on deposition on or before 9:00 A.M., May 10, 1981. [O 1-2].

Order of trial court granting Motion to Compel Discovery filed June 15, 1981, striking defendant's defensive pleadings and incarcerating defendant until he answers same. [P 1-2].

Opinion of the Court of Appeals dated

December 2, 1981, dismissing defendant's appeal on grounds that same was not from an appealable judgment. [Q 1-5].

Reconsideration denied December 18, 1981. [Q 5].

Opinion of Court of Appeals of December 2, 1981, affirming right of trial court to punish for contempt because appeal filed did not effect supersedeas. [R 1-4].

Reconsideration denied December 18, 1981. [R 4-8].

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Opinion of Supreme Court of May 25, 1982, affirming trial court's right to punish for contempt and dismissing cert. on appeal question. [S 2-11].

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Defendant's Motion to Discharge Contempt

filed July 13, 1982. [U 1-5].

Order of trial court denying discharge of contempt filed July 13, 1982. [V 1].

Defendant's Motion to Set Aside and Vacate Orders of Judge Lamar Knight filed November 2, 1982. [W 1-2].

Opinion of Court of Appeals of November 3, 1982, affirming trial court's refusal to purge contempt after defendant's answer of 5th Amendment. [X 1-10].

Opinion of Court of Appeals of January 17, 1983, denying Motion for reconsideration. [Y 1-5].

Supreme Court's denial of certiorari of February 12, 1983. [Y 6].

Order of trial court putting defendant back into jail of May 9, 1983. [Z 1-6].

Order denying Defendant's Motions for Judgment of Dismissal on the Pleadings dated June 8, 1983. [AA 1].

Pretrial Order (portions) of November 15,

1982. [BB 1-5].

Objection to Pretrial Order and Request to Amend of November 15, 1982. [CC 1-5].

Additional objections to Pretrial Order dated December 20, 1982. [DD 1-4].

Defendant's Motion for Continuance dated June 14, 1983, and Amendment to Pretrial Order to Reinstate Answer, Defensive Pleadings and Include CounterClaim. [EE 1-9].

Defendant's Objections to trial proceeding under conditions set forth in pretrial order and while defendant not present for trial of June 14, 1983. [FF 1-8].

Court of Appeals standing Order regarding supersedeas and filing of Notice of Appea.

JURISDICTIONAL STATEMENT

Since this petition is being filed within ninety (90) days of the denial by the Georgia Supreme Court's of petitioner's timely filed Motion for Reconsideration of June 23, 1985, the same is timely.

The jurisdiction of this Court is invoked under 28 U.S.C. 2101 and 28 U.S.C. 1257 in that highest courts of the State of Georgia have made a final adjudication that is repugnant to the Constitution of the United States of America.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FEDERAL CONSTITUTION

AMENDMENT V

No person shall answer for a capital, or otherwise infamous crime, ... nor shall be subject for the same offense to be twice put in jepoardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right o a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,...to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1 ...No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

GEORGIA STATE STATUTES & CONSTITUTION

Ga. Code Ann. 38-1102:

"No party shall be required to discover matters tending to criminate himself, or to expose him to a penalty or forfeiture, nor to make discovery of irrelevant matters, nor the advise of his professional advisors, nor his consultant with them,..."

Ga. Code Ann. 38-1205:

"(a) No party shall be required to testify as to any matter which may criminate or tend to criminate himself or which shall tend to bring infamy or disgrace or public contempt upon himself or any member of his family.

(b) ...no party shall be required to testify as to any matter which shall tend to work a forfeiture of his estate."

Ga. Code 2-113 and 38-417:

"No person shall be compelled to give testimony tending in any manner to criminate himself."

Art. 1, Sec. 1, Para XII of the Constitution of 1983, provides:

"No person shall be deprived of the right to prsecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state."

Art. 1, Sec II, Para. III of the Constitution of 1983 provides:

"Protection to person and property is the paramont duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

Ga. Code Ann. 81A-108 (O.C.G.A. 9-11-8) provides:

A claim for relief may be pleaded as an original claim, counter-claim, cross-claim or a third-party claim.

Ga. Code Ann. 20-501, provides:

"CONTRACTS TO DO IMMORAL OR ILLEGAL THING

A contract to do an immoral or illegal thing is void. If the contract be severable, that which is legal will not be annulled by that which is illegal."

Ga. Code Ann. 20-504, provides in pertinent part:

"A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contact..."

O.C.G.A. 9-11-54 (c) (1) provides that a judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. When the judgment exceeds the demant, it is to that extent a nullity.

O.C.G.A. 7-4-2 provides for interest at the rate of 7% when notice as required by O.C.G.A. 51-12-14 has not been given.

RULES OF THE SUPREME COURT OF GEORGIA

RULE 39: ...Enumerations of error shall be stated as a separate part of, and shall be incorporated in, the brief....

RULE 40:: All briefs shall be typed or printed (at least double spaced) on letter size (81/2" X 11") paper...The briefs of all parties shall be limited to 30 pages in civil cases except upon written application directed to the clerk and authorized by the court.

RULE 41: Supplemental briefs may be filed without permission any time before decision.

RULE 45: Any enumerated error which is not supported by argument or citation of authority in the brief shall be deemed abandoned. All citations of authority must be full and complete.

STANDING ORDER OF COURT OF APPEALS (See GG-1)

REASONS FOR GRANTING WRIT OF CERTIORARI

The questions presented by this petition requires the attention of this Court in order to ensure that the rights guaranteed by the Fourteenth Amendment , Fifth Amendment, Sixth Amendment and Eighth Amendment to the United States Constitution are not compromised by a failure of the courts to insure that the laws operate on all persons alike so as not subject an individual to arbitrary exercise of powers of government as required in Minder v. Georgia, 183 U.S. 559, 46 LEd 328, 22 SCt 224 (1902). Further the concerns of due process is with the fair administration of justice as required in Mayberry v. Pennsylvania, 400 U.S. 455, 27 LEd 2D 532, 91 SCt 499. Refusal of the court to hear and decide a case before it when there are no other courts competent to hear such case could amount to denial of due process under the Fourteenth Amendment. Atkins v. U. S. (1977) 214 Ct Cl 186, 556 F2d 1028, cert den 434 US

1009, 54 LEd 2d 751, 98 SCt 718.

When the court decides an appeal in a way that is arbitrary with respect to the issues involved and fails to provide an adequate opportunity to present one's claim fairly in the context of the State's appellate process, appellant has been deprived of a property right and not accorded the due process and equal protection of the 14th Amendment to the Constitution of the United States. It is recognized that a State must provide more than a "meaningless ritual." Evitts v. Lucy, 105 S.Ct. 830 (1985); Douglas v. California, 372 U. S. at 358, 83 S.Ct. at 817.

Where a State has told one that he may refuse to answer questions which may tend to incriminate him, hold him up to public ridicule and contempt, etc., but when he invokes the protection of the State Statutory and Constitutional provision, they are ignored by

the state courts, he is denied due process and equal protection of the laws guaranteed by the 14th Amendment when his defensive pleadings are stripped from him in a Million Dollar law suit for his refusal to answer questions, and he is incarcerated in jail.

A waiver may be only knowingly and voluntarily given and the Court may indulge every presumption against loss of a constitutional right. Ill. v. Allen, 90 S. Ct. 1057, 397 U. S. 338, 25 L.Ed. 2d 353, rehearing denied 90 S. Ct. 1684, 398 U. S. 915, 26 L. Ed. 2d 80.

There is a presumption against waiver of a constitutional right, and for waiver to be effective, it must be clearly established that the waiver was intentional relinquishment or abandonment of known right or privilege. Brookhart v. Janis, 86 S. Ct. 1245, 384 U. S. 1, 16 L.ED. 2D 314.

The question of an effective waiver of

federal constitutional rights in a proceeding is governed by federal standards. Boykin v. Alabama, 89 S. Ct. 1709, 395 U.S. 238, 23 Led 2d 2

Though Federal law governs as to whether petitioner waived his United States Constitutional right against self-incrimination by first relying on State Statute, in the case of Kennedy v. Manry, 6 Ga. App. 816, 66 S.E. 29 (1909) (under election of remedies) the Court pointed out the election between inconsistent remedies may amount to a waiver of one vis a vis the other, however, between consistent remedies that is not the case. The court should not presume acquiescence to the loss of a fundamental right and waiver should not be lightly inferred. Smith v. United States, 337 U. S. 137, 93 Led 1264, 69 SCt 1000. In the Miranda v. Arizona, 384 U.S.436, 16 L. ed. 2d 694, 86 S. Ct. 602, the court said that very strong proof is necessary to convince the Court that a constitutional right has been waived.

Further, when a constitutional right is

74. vested in a party and there is a doubt as to whether it has been waived such doubt should be resolved in the favor of the person asserting the right. Whether an individual waives a federal constitutional right is not the question of fact, it is an issue of Federal law. Brewer v. Williams, 430 U.S. 387, 51 Led 2d 424, 97 SCt. 1232.

The fact that one relies upon State law as opposed to Federal law does not constitute a waiver.

Further, a litigant has a property interest in a Counter-claim and the court's failure to allow him to prosecute same is a denial of his due process rights as guaranteed by the Fourteenth Amendment.

A reading of the opinion of the Supreme Court of Georgia [B 2-22] evidences that the court has not fairly applied the laws equally to the petitioner as to others as is shown in their statement under Endnote no. 10 "Our affirmance

of the jury's award of damages in this case rests solely upon Rule 45. It is not, and should not be construed as, legal or physical precedence for future awards of this type or magnitude."

The doctrine of "clean hands", illegal and immoral contracts, public policy are universally recognized doctrines which prevent recovery because if the such transactions are pleaded by the plaintiff, there is no cause of action existing, therefore there can be no recovery.

However the Court failed to make any determination as to whether Plaintiffs pleaded a cause of action as though a default by the defendant would make such an illegal cause of action legal. [B 16].

The Court has deemed the enumeration abandoned; however, if the Court would notice Enumeration of Errors 47 and 50 [page E 18 -19] and the argument for same [E 32, 37, 38, 39 - 40], it has clearly been

addressed.

If the Court is complaining that the arguments are brief, their failure to allow additional pages upon request [D 1] in a case of this complexity is a denial of petitioner's right to fairly present his appeal. Further, Petitioner filed additional briefs expanding the argument of certain enumerations of error prior to the issuance of an opinion by the court pursuant to Rule 42.

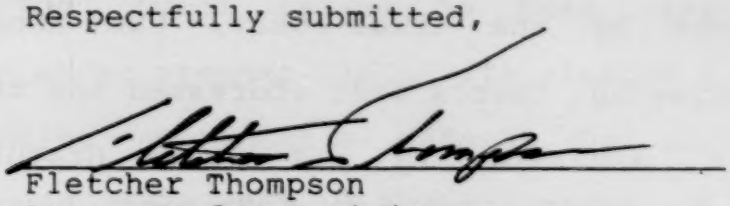
As can be seen, Petitioner was jailed several times by the trial court, but none of the reviewing courts ever addressed the validity of his assertion of his State Statutory and Constitutional rights in any of the appeal procedures which is a denial of Petitioner's due process rights guaranteed by the 14th Amendment to the United States Constitution.

CONCLUSION

Petitioner respectfully submits that this Court should grant certiorari and reverse the decisions of the State Courts of Georgia because of the invidious discrimination to Petitioner caused by the Courts failure to fairly administer the law to this Petitioner as it would to all citizens similarly situated.

Petitioner respectfully prays that a Writ of Certiorari issue and Petitioner's constitutional rights be protected.

Respectfully submitted,



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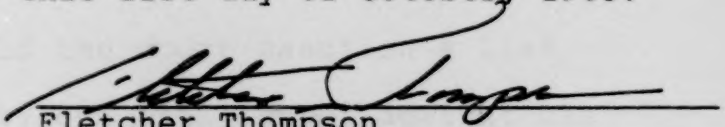
CERTIFICATE OF SERVICE AND OF MAILING

I hereby CERTIFY that I have this day forwarded the original and 39 copies of this Petition for Certiorari to the United States Supreme Court by placing copies of same in a properly addressed package to:

Clerk of the Supreme Court
of the United States
Supreme Court Building
1 First Street, NE
Washington, D. C. 20543

and have served three copies of same upon attorney for respondents, Mr. Mitchell Gross, Suite C, 1874 Independence Square, Dunwoody, Georgia 30338 by placing copies of same in a properly addressed package with sufficient first class postage attached thereto on both packages and depositing same in the United States Mail this 21st day of October, 1985.



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A-1

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA, 7-23-85

The motion for rehearing was denied today: Case No. 41724, Cohran v. Carlin, et al.,

Smith, J., dissents. Weltner, J., not participating.

Yours very truly,

Mrs. Joline B. Williams,
Clerk

41724. COHRAN v. CARLIN et al

SMITH, Justice, dissenting.

The Carlins base their complaint upon a fraud and an admitted "sham" that they instigated. They allege that they created phony contract with Cohran in order to defraud creditors, and that they subsequently carried their fraudulent transactions further by tranferring various assets to Cohran. Cohran should not need to present a defense to the Carlin's claims. The claims are based upon fraud, and the complaint should accordingly be seen as worthless on its face, regardless of any defense that Cohran might have presented.

Would the court sanction a like lawsuit by one bank robber against his partner for the proceeds of their endeavors if the defendant were "on the lam" or in a distant prison? The Court,

in this case does not hold attorneys to a higher standard than any other person. The court simply lowers the burden for legal malpractice plaintiffs.

B-1

SUPREME COURT OF GEORGIA

Atlanta, June 19, 1985

The Honorable Supreme Court met pursuant to adjourment.

The following order was passed:

COHRAN V. CARLIN et al.

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that this Court's judgment of February 8, 1985, is hereby vacated.

All the Justices concur, except Smith, J., who would grant the rehearing.

SUPREME COURT OF THE STATE OF GA.,

Clerk's Office, Atlanta,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

In the Supreme Court of Georgia

Decided: June 19, 1985

41724. COHRAN v. CARLIN et al.

BELL, Justice.

This is an appeal from a judgment awarding c and punitive damages. The procedural history of the case is quite complex, involving several reassign judges[1] and numerous superior court hearings and interlocutory appeals In order to lay the foundation for consideration of this appeal, it is necessary to first summarize the relevant aspects of the case history, especially the discovery proceedings. Although this opinion may be to some extent repetitive of earlier opinions in this case, we deem it helpful to consolidate in this manner.

This suit arose from the attorney-client relationship between Larry Cohran,

defendant-appellant, and Stan Carlin and his wife, plaintiffs-appellees. On March 29, 1979, Stan Carlin was arrested by federal authorities for allegedly stealing one million dollars from Brown & Root, Inc. under a check fraud scheme.[2] Appellees sought Cohran's services and on April 2 they and Cohran entered into a written employment contract. This written contract provided that the Carlins would pay Cohran a flat fee of one million dollars. The contract provided further that Cohran would represent the Carlins for one year in any matters arising out of transactions between the Carlins and Brown & Root. After signing the contract the Carlins transferred title to money, real estate and a gun collection to Cohran. Two months later the Carlins terminated the attorney-client relationship and

requested Cohran to reconvey their property, but he refused.

The Carlins filed this suit on August 23, 1979, seeking damages for wrongful conversion of their property (including attorney fees for bad faith) and compensatory and punitive damages for legal malpractice and tortious fraud. The Carlins alleged that the written employment contract was a sham, the true contract having been a contemporaneous oral contract which provided that the Carlins would pay Cohran $60 per hour in attorney fees for representing Stan Carlin on the criminal charges and for assisting the Carlins in hiding their assets from Brown & Root. The Carlins asserted that Cohran had orally agreed to withdraw money from their bank accounts and immediately deliver it to them. The Carlins also asserted that by the terms of their oral

contract Cohran was to record warranty deeds to their real estate in his name, but then reconvey to the Carlins by unrecorded warranty deeds, which they were to hold until litigation with Brown & Root ended.[3] The Carlins further asserted that under a similar term of their oral agreement Cohran was supposed to secretly return their gun collection.

On October 22, 1979, Cohran filed his answer;[4] a counterclaim for breach of the written employment contract and fraud; and a third-party complaint against the Carlins' attorneys. In his pleadings Cohran outlined his own version of his April 1979 negotiations with the Carlins. He maintained that the Carlins transferred the money and property to him as partial payment of his attorney fees. Cohran asserted that Stan Carlin had told him that Carlin had an enforceable

contract with Brown & Root to sell mineral rights to Brown & Root for sixteen million dollars and that that Carlin has already received one million dollars under that contract. Cohran attempted to justify his one-million-dollar-fee by alleging that it included representation of the Carlins against Brown & Root in separate suit to recover the remaining fifteen million dollars under the mineral rights contract. See fn. 3, supra.

On August 23, 1979 the Carlins served Cohran with a notice to produce documents and to depose. On October 2, 1979, Cohran moved to quash the notices, and also sought a protective order. A hearing on October 18, 1979, resulted in an order requiring Cohran to produce certain documents and submit to a deposition. The Carlins subsequently moved to compel discovery and impose sanctions, alleging

Cohran had not complied with the order. During the December 10, 1979, hearing of this motion, Cohran was orally directed to produce documents and submit to a deposition. One week later Cohran submitted to the taking of his deposition, but he refused to produce documents or answer approximately 90 questions, and on May 19, 1980, the Carlins filed their second motion to compel discovery and impose sanctions.

On May 4, 1981 (after considerable delay involving reassignment of the case to another judge, see fn. 1, supra), a hearing was held which resulted in orders for Cohran to produce a specific list of documents and to answer 71 of the approximately 90 questions which he had failed to answer at the December 17, 1979, deposition. Cohran was further ordered to comply with these orders before

May 10, 1981. In addition, Cohran's third-party complaint was dismissed, from which dismissal he filed a notice of appeal on May 8, 1981.

On May 20, 1981, the Carlins filed their third motion to compel discovery and impose sanctions, asserting that Cohran had not produced documents and answered questions as ordered. This motion was argued at a hearing on June 15, 1981. Cohran asserted at this hearing that he had not complied with the May 4 discovery order because he believed that a supersedeas was in effect due to his notice of appeal filed on May 8. The court did not accept this defense, and issued an order holding Cohran in contempt and striking Cohran's "defensive pleadings" on the ground that Cohran had wilfully failed to comply with the May 4 discovery orders. See OCGA § 9-11-

37(b). That same day Cohran filed a notice of appeal from the imposition of sanctions.

In Cohran v. Jones, 160 Ga. App. 761 (288 SE2d 80) (1981), the Court of Appeals dismissed Cohran's appeal of the dismissal of his third-party complaint. We initially granted certiorari but subsequently dismissed the writ. Cohran v. Carlin, 249 Ga. 510 (291 SE2d 538) (1982).

In Cohran v. Carlin, 160 Ga. App. 762 (288 SE2d 81) (1981), the Court of Appeals considered whether the trial court retained jurisdiction to impose sanctions after Cohran filed his May 8, 1981, notice of appeal in Cohran v. Jones, supra, 160 Ga. App. The Court of Appeals answered this question affirmatively, holding that Cohran's appeal in Cohran v. Jones had not served as a supersedeas. We granted

certiorari and affirmed. Cohran v. Carlin, supra, 249 Ga.

When the remittitur affirming the contempt order was returned to the trial court, Cohran was redeposed and answered most of his previously unaddressed 71 questions. However, Cohran refused to answer some 15 questions and moved to discharge the contempt order, relying for the first time on his Fifth Amendment privilege. This motion was denied and he appealed the Fifth Amendment issue. The Court of Appeals affirmed, holding that Cohran had waived the Fifth Amendment privilege by his failure to invoke it in a timely and proper fashion, Cohran v. Carlin, 165 Ga. App. 141 (297 SE2d 54) (1982), and this court denied certiorari, see 165 Ga. App. 895 (1982).

On November 15, 1982, a pre-trial order was entered declaring the case in

default and limiting the issues for trial to damages. The jury verdict and subsequent judgment were for the Carlins, awarding $45,007 in compensatory damages, $19,949 as interest, $75,000 as attorney fees, and $1,000,000 as punitiive damages. The judgment also voided the deed from the Carlins to Cohran. The instant appeal is from that judgment.[6] We affirm.[7]

1. The first issue we address is the imposition of sanctions by the trial court. Cohran contends that his refusal to comply with the May 4, 1981, discovery order was justified on three grounds: (a) the Carlins' alleged failure to arrange for the taking of Cohran's deposition during the ordered time; (b) objections, based on claims of privilege and other grounds, to the deposition questions he refused to answer; and (c) his belief that

his appeal of the May 4, 1981, discovery order granting the third-party motion to dismiss acted as supersedeas which rendered the subsequent discovery proceedings a nullity. However, we find that these contentions are patently fatuous.

a. As to the first ground, a review of the record reveals that Cohran has raised this issue for the first time in this appeal. Since this argument was not raised below, it will not be considered here. Hammond v. Paul, 249 Ga. 241 (1) (290 SE2d 54) (1982); Sawyer v. Citizens and Southern Nat. Bank, 64 Ga. App. 177, 183 (296 SE2d d34) (1982); Carter v. Pruitt, 235 Ga. 204 (219 SE2d 114) (1975).

Furthermore, this ground must be deemed abandoned pursuant to our Rule 45, as Cohran provides no argument in support

of it. See also Wilkie v. State, 153 Ga. App. 609 (1) (266 SE2d 289) (1980).

b. We likewise deem the second ground abandoned under Rule 45. Cohran asserted this ground in his original brief, but provided no argument therein to support it. Neither did he argue this enumeration in his oral argument. He first provided support for it in a post-oral argument supplemental brief, which he filed more than two months after the case was docketed in this court. Arguments asserted for the first time in a post-oral argument brief are untimely, and will not be considered. Savage v. Savage, 234 Ga. 853, 856 (218 SE2d 568) (1975); Savage v. Savage, 238 Ga. 16 (2) (230 SE2d 851) (1976).[8]

Moreover, we find that Cohran's objections to the deposition questions have already been reviewed adversely to

him, and are therefore law of the case. Cohran v. Carlin, supra, 165 Ga. App.[9]

c. Cohran's treatment of his third ground also fails to comply with Rule 45. As with his second ground, he did not argue this ground in his original brief or during his oral argument, only raising it for the first time in his post-argument brief. It is therefore untimely, and deemed abandoned. Savage v. Savage, supra, 234 Ga. In addition, it is clearly without merit, since Cohran's reliance on his appeal in Cohran v. Jones, supra, 161 Ga App., as supersedeas was previously held by this court to be incorrect. Cohran v. Carlin, supra, 249 Ga.

2. The next issue we address is whether the term "defensive pleadings" as used in the June 15, 1981, order encompasses Cohran's counterclaim. Cohran contends that the striking of his

"defensive pleadings" did not include his counterclaim, and that the trial court erred in refusing to allow him to go forward with that pleading at trial. The Carlins respond that the counterclaim was in fact stricken by the June 15 order.

We find that Cohran waived this objection in the superior court. At the beginning of trial the Carlins moved in limine to prevent Cohran from introducing evidence or argument as to issues contained in the counterclaim. One of the bases for their motion was that the counterclaim had been one of the pleadings stricken by the trial court. Cohran's counsel objected to the motion in limine (which was granted over his objection) on other grounds, but omitted to address the issue which he now urges on appeal.

3. Several of Cohran's enumerations of error consist of contentions that the

superior court erroneously refused to permit him to pursue certain defenses at trial. Those defenses included his arguments that the oral contract is illegal, immoral, and contrary to public policy; that the Carlins should not have been permitted to use parol evidence to negate the unambiguous written contract of employment; and that the Carlins' own pleadings constitute an admission of fraudulent conduct which should have estopped them from obtaining a favorable judgment on their claims. We find no error.

Pretermitting any consideration of defenses merits of these defenses, we find that the threshold is whether, in the face of having suffered default, Cohran should have been permitted to present any defense which might have tended to defeat the Carlin's right of recovery. The answer is

clearly in the negative. The rule is that a defendant in default "is in the position of having admitted each and every material allegation of the plaintiff as to the amount of damages alleged." Flanders v. Hill Aircraft & Leasing Corp., 137 Ga. App. 286, 287 (223 SE2d 482) (1976) (Marshall, Judge, now Presiding Justice). The default concludes the defendant's liability, and estops him from offering any defenses which would defeat the right of recovery. Id. at 287-88. Accord Hazzard v. Phillips, 249 Ga. 24 (2) (287 SE2d 191) (1982); Perrin v. Kilgore, 158 Ga. App. 300, 301 (1) (279 SE2d 714) (1981). All of the defenses in question -- public policy, clean hands, etc. - are attempts to contest the merits of the case. Cohran was therefore estopped from presenting them at trial and the superior

court properly limited the trial to the issue of damages.

4. In several enumerations Cohran asserts various contentions concerning the damages awarded by the jury. For example, in his fiftieth enumeration award he contends that the award of one million dollars in punitive damages "was clearly excessive and was the result of bias and prejudice toward the appellant." However, as with so many of his other enumerations, Cohran has failed to support these enumerations of error with argument or citation of authority, and they must be deemed abandoned. Supreme Court Rule 45.[10]

5. The remainder of appellant's enumerations of error are either abandoned or clearly without merit.

For all the reasons stated above, we affirm the judgment.

Judgment affirmed. All the Justices concur, except Gregory, J., concurring in the judgment only, and Smith, J., dissenting to Division 4 and the judgment.

ENDNOTES

[1] When the action was filed a Cobb superior court judge was assigned under the rotation system but Cohran moved for the case to be assigned to another judge. The chief judge of the circuit assigned a senior judge to hear this motion. On October 23, 1979, this senior judge assigned the case to himself. He disqualified himself on January 7, 1981, citing a heavy caseload as the reason for his disqualification. The case was placed back on the rotation system, resulting in the case again being assigned to the same superior court judge as when the case was originally filed. Cohran again moved that the case be reassigned, and the parties agreed to have the case assigned to a second senior judge. On April 14, 1981, the chief judge of the circuit (a successor to the original chief judge) assigned the case to this second senior judge, who eventually dismissed Cohran's defensive pleadings as a sanction for failure to comply with discovery orders. On July 20, 1982, this senior judge recused himself from the case. On August 31, 1982, the chief judge assigned the case to a third senior judge. That judge directed the case through pre-trial and trial proceedings and entered final judgment.

[2] Stan Carlin was convicted of five counts of interstate transportation of forged securities in violation of 18 transportation of forged securities in violation of 18 U.S.C. § 2314 (1976). Carlin was sentenced and judgment was

entered on October 30, 1979. His conviction was affirmed by the U. S. Court of Appeals for the Eleventh Circuit. United States v. Carlin, 698 F2d 1133 (11th Cir. 1983), cert. denied, 461 U. S. 958 (103 SC 2431, 77 LE2d 1317) (1983).

[3] Cohran filed suit on behalf of the Carlins against Brown & Root in a separate civil action in Cobb Superior Court to recover the remaining amount allegedly due from Stan Carlin's sale of mineral rights to Brown & Root. That case was removed to federal district court by Brown & Root.

[4] The superior court had granted Cohran an additional thirty days to respond to the complaint.

[5] Those attorneys also served as counsel for the Carlins in other litigation related to this case.

[6] The verdict was returned and filed June 16, 1983. Judgment on the verdict was entered June 23, 1983, nunc pro tunc to June 16. On June 22 Cohran had filed a motion j.n.o.v., which was heard November 21 and denied December 7, 1983. Cohran filed his notice of appeal January 6, 1984. The court reporter certified the transcript on September 30, 1983. The clerk of the court certified the record on October 16, 1984, and the appeal was docketed in this court on November 15, 1984. We heard oral arguments January 21, 1985.

[7] We initially affirmed without opinion pursuant to Supreme Court Rule 59. On motion for rehearing we vacate that

disposition, and substitute the instant opinion.

[8] The relevant portions of both Savage appeals were determined under former Supreme Court Rule 18(c)(2), which was found at 226 Ga. 905, 914 (effective July 1, 1971), and 235 Ga. 861, 876 (effective December 1, 1975). Our present Rule 45, 252 Ga. A-1, A-9 (effective July 1, 1984), is essentially identical to former Rule 18(c)(2).

[9] Cohran asserts, without elaboration, that our appellate courts have thus far failed to consider his objections. We are at a loss to understand this contention, since they clearly have been considered, but we can speculate that Cohran's assertion is simply another way of saying that he is dissatisfied with the interlocutory opinions of this court and the Court of Appeals. Mere dissatisfaction, of course, is not sufficient reason to overturn a prior ruling by an appellate court.

[10] Our affirmance of the jury's award of damages in this case rests solely upon Rule 45. It is not, and should not be construed as, legal or physical precedent for future awards of this type or magnitude.

C-1

In the Supreme Court of Georgia

Decided: February 8, 1985

41724. COHRAN v. CARLIN

Judgment affirmed without opinion pursuant to Rule 59. All the Justices concur, except Smitha dn Weltner, JJ., dissenting.

41724. COHRAN v. CARLIN

SMITH, Justice, dissenting.

I dissent to the granting of a Rule 59 affirmance. I feel that the defendant in any case in which a court or jury returns a verdict for punitive damages in the sum of $1,000,000 deserves a written opinion setting out its position for sustaining the trial court.

D-1

December 3, 1984

Hand Delivered

Ms. Joline B. Williams
Clerk of the Supreme Court
244 Washington Street, S. W.
Room 572
Atlanta, Georgia 30334

RE: Cohran v. Carlin
Civil Action, Case No. 41724

TO THE SUPREME COURT:

Appellant hereby request that he be allowed to file a Brief in excess of the thrity (30) pages allowed by Rule 40.

Appellant's brief is due to be filed [December] 5, 1984, and due to the length of the Enumeration of Errors it is not possible to properly address each Enumeration as required by Rule 45 of this Court.

Appellant therefore request that he be allowed to file a brief totalling fifty (50) pages.

Respectfully requested,

Larry Cohran
Appellant

cc: Mr. Taylor Jones
Attorney for Appellee

E-1

[Filed December 5, 1984]

IN THE SUPREME COURT FOR THE STATE OF GEORGIA

LARRY COHRAN, *
Appellant,

vs. * CIVIL ACTION NO. 41724

STAN CARLIN, et al., *
Appellees.

BRIEF OF APPELLANT

STATEMENT OF FACT

Appellee Stan Carlin was arrested on charges of the theft of One Million Dollars from Brown & Root, Inc., a Texas Corporation. He sought the services of appellant, an attorney, to represent him on said charges. Appellant went to the Fulton County jail to discuss representing Carlin and the terms of his employment. Stan Carlin had made a proposal to sell some sixteen million acres of mineral rights in Australia to Brown & Root of Texas for Sixteen Million Dollars to be paid at the rate of One Million Dollars per quarter. He had already received the first installment. After some

discussion, appellant and Stan Carlin agreed as to the terms of appellant's employment and the following day, appellant returned to the jail with a written employment contract [R. 24] providing the appellant would represent Stan Carlin on the criminal charges against him, would file suit on his behalf against Brown & Root for breach of contract to collect the Fifteen Million Dollars owing to Stan Carlin, and for the representation of either or both of the Carlins in any other matters arising out of the Brown & Root transaction for one year from the date of employment for a flat fee of One Million Dollars. Both the Carlins signed the employment contract and to secure appellant's attorney's fee, the Carlins signed three pieces of real property over to appellant by Warranty deed [R. 36, 37, 38] and assigned funds [R. 25, 26, 27, 28, 29, 30, 31, 32, 33, 34] to appellant in various bank accounts (three hundred thousand dollars being money from Brown & Root and some funds that were not derived from Brown & Root).

After approximately two months of employment, the Carlins fired appellant and brought suit in Cobb Superior Court [R. 11-39] alleging that the written employment contract was a "sham" and that the true contract was an oral contract providing for attorney's fees in the amount of $60.00 per hour for this representation in defending him against the criminal charges and to hide the Carlins' assets from Brown & Root including the money stolen from Brown & Root [R. 14, par. 8]. Appellees alleged that the assignments of the funds was for the purpose of allowing appellant to get the money out of the banks and that appellant was then immediately to turn it over to them. Further, appellant was to take the warranty deeds on the property and record same in his name and then immediately give them back an unrecorded warranty deed to the properties that they were going to hold until the expected litigation was over with Brown & Root.

The complaint further alleged that a gun

collection turned over to appellant by Margaret Carlin had been converted by appellant and that appellant refused to return them. Appellees complained that appellant had told them that he had connections with one or more judges in the Cobb Superior Court and that when the suit was filed against Brown & Root, a judge or judges to whom the case was assigned would "take care" of the case to the benefit of appellees, but that the case was removed to Federal Court and whatever connections, if any, the appellant had with one or more judges of the Cobb Superior Court were nullified and of no benefit to appellees [R. 20, par. 20 c, d].

Appellees sought judgment against appellant because of the appellant's breach of the "oral" contract of employment, and breach of fiduciary duty thereunder in his failing and refusing to obtain the Brown & Root money in said bank accounts and turn it over to the appellees and his failure to give them unrecorded deeds to the real property.

Appellant filed an answer [R. 40-80] denying any wrong doing and maintaining that the written contract was the only contract between appellant and appellees and made a counter-claim [R. 55-63, 353-355] for breach of the written employment contract and fraud. At the time of said answer, appellant set up certain defenses to the action based upon the clean hands doctrine of equity and filed a Motion for Judgment on the Pleadings. Said Motion for grounds alleged that if appellees' complaint were taken as true, it showed on its face that it was an attempt to hinder, delay and defraud creditors and was an attempt to alter a written contract by oral evidence. Further, that said oral contract was not enforceable and could not be maintained in that it was against the public policy of the State of Georgia. Said Motion for Judgment on the Pleadings [R.81, 82] was transformed into a Motion for Summary Judgment [R. 122] and Judge Lamar Knight overruled said Motion [R. 225].

Subsequently, appellant's defensive pleadings were stricken because appellant had relied upon his State and Statutory rights of refusing to answer certain questions on deposition and the case proceeded to trial with appellant in default.

A verdict [R.. 417] and judgment [R. 421-422] was rendered for appellees in excess of One Million Dollars.

AMENDED
ENUMERATION OF ERRORS

Now comes Appellant in the above-styled case and amends his heretofore filed Enumeration of Errors to include certain record page numbers and transcript page numbers inadvertently omitted from the original Enumeration of Errors as follows:

ENUMERATION OF ERROR NO. 1

The trial court erred in its order of May 4, 1981 entered May 8, 1981 [R. 225] which overruled appellant's Motion for Judgment on the Pleadings as to Court I [R. 81] and Count II [R.

82] [R. 135 -165] of appellees' complaint [R. 11-39] which had been converted to a Motion for summary Judgment by the Court in its order of May 5, 1980 [R. 122].

ENUMERATION OF ERROR NO. 2

The trial court erred in the entry of its Pre-trial Order of November 15, 1982 [R. 346-350] which in effect overruled and superseded appellant's Motion for Dismissal on the Pleadings as to Count I of November 12, 1982 [R. 344].

ENUMERATION OF ERROR NO. 3

The trial court erred in the entry of its Pre-trial Order of November 15, 1982 [R. 346-350] which in effect overruled and superseded appellant's Motion for Dismissal on the Pleadings as to Count II of November 12, 1982 [R. 345].

ENUMERATION OF ERROR NO. 4

The trial court erred in the entry of its order of June 6, 1983, entered June 8, 1983 [R. 365] overruling appellant's Motion for Dismissal

on the Pleadings as to Count I of November 12, 1982 [R. 344].

ENUMERATION OF ERROR NO. 5

The trial court erred in the entry of its order of June 6, 1983, entered June 8, 1983 [R. 365] overruling appellant's Motion for Dismissal on the Pleadings as to Count II of November 12, 1982 [R. 345].

ENUMERATION OF ERROR NO. 6

The trial court erred in the entry of its order of December 7, 1983 [R. 448], overruling appellant's Motion for Judgment Notwithstanding the Verdict of June 22, 1983 [R. 418-422, 425-447, T. of 11-21-83, pp. 1-59].

ENUMERATION OF ERROR NO. 7

The trial court erred in the entry of Judgment of June 23, 1983, signed on June 20, 1983 nunc pro tunc as of June 16, 1983 [R. 421-422] on the Verdict returned on June 16, 1983 [R. 417].

ENUMERATION OF ERROR NO. 8

The trial court erred in the entry of its

Pre-trial Order of November 15, 1982 [R. 346-350] declaring that "As this case is in default and liability has been fixed, [appellant] will not be allowed to comment on or introduce evidence regarding equitable principles such as the 'clean hands' doctrine insofar as such principles apply to original transactions between the parties."

ENUMERATION OF ERROR NO. 9

The trial court erred in the entry of its Pre-trial Order of November 15, 1982 [R. 346-350] in that the court refused to allow appellant to proceed on his Counter-Claim [R. 55-63, 353-356] against appellees Stan and Margaret Carlin.

ENUMERATION OF ERROR NO. 10

The trial court erred in the entry of its Pre-trial Order of November 15, 1982 [R. 346-350] overruling appellant's Motion to Set Aside and Vacate Order of Judge Lamar Knight [R. 336, 337-343].

ENUMERATION OF ERROR NO. 11

The trial court erred in its ruling of June 14, 1983 [T. 25, 6-13-83] in allowing appellees' Motion in Limine [R. 2236] in refusing to allow appellant to introduce evidence to support his Counter-Claim [R. 55-63, 353-356, 387-389, T. 17-25].

ENUMERATION OF ERROR NO. 12

The trial court erred in its ruling of June 14, 1983 [T. 189, 190, 193, 6-13-83] in allowing parts of appellant's depositions [T. 191-234] to be read into evidence which were irrelevant, immaterial and prejudicial to appellant over objection of counsel [T. 188-189, 191-193, 234, 6-13-83].

ENUMERATION OF ERROR NO. 13

The trial court erred in refusing to allow appellant a thorough and sifting cross-examination of appellee Stan Carlin by refusing to allow appellant to impeach Carlin's testimony that he had never been arrested except on charges of Interstate Theft of Stolen

Automobiles and Interstate Theft of Stolen Securities. [T. 421, 438].

ENUMERATION OF ERROR NO. 14

The trial court erred in refusing to allow into evidence a certified copy of an application of appellees, Stan and Margaret Carlin, for an auto dealership [D1] for the purpose of impeachment which showed that Stan Carlin had sworn under oath that he had never been convicted of a felony [T. 572].

ENUMERATION OF ERROR NO. 15

The trial court erred in overruling appellant's Motion for Directed Verdict [T. 581, 582].

ENUMERATION OF ERROR NO. 16

The trial court erred in refusing to allow appellant, an attorney, to make oral argument on his behalf to the jury in said case in violation of Art. I, Sec. I, Para. IX of the Constitution of the State of Georgia of 1976 and the 6th and 14th Amendments to U. S. Constitution [T. 584].

ENUMERATION OF ERROR NO. 17

The trial court erred in charging the jury that during the "attorney and client relation, Plaintiffs transferred a sum of money, some parcels of real estate, and several firearms to Defendant." [T. 686-687, 704].

ENUMERATION OF ERROR NO. 18

The trial court erred in charging the jury that "all transactions between an attorney and his client are closely scrutinized and the attorney's duty in these circumstances is much higher than ordinary business dealings where the parties trade at arms length" [R. 370, T. 694] without giving the charge that the attorney--client relationship does not begin until after a contract of employment has been entered into by the parties. [T. 704, 705, 714, R. 49, 50].

ENUMERATION OF ERROR NO. 19

The trial court erred in instructing the jury to deed the house of appellees back to them over objection of counsel. [T. 698-699].

ENUMERATION OF ERROR NO. 20

The trial court erred in refusing to charge appellant's Request to Charge No. 2 [R.391, T.686-702, 705/706, 714/415].

ENUMERATION OF ERROR NO. 21

The trial court erred in refusing to charge appellant's Request to Charge No. 3 [R.391, T.686-702, 705/706, 714/715].

ENUMERATION OF ERROR NO. 22

The trial court erred in refusing to charge appellant's Request to Charge No. 4 [R.391, T.686-702, 705/706, 714/715].

ENUMERATION OF ERROR NO. 23

The trial court erred in refusing to charge appellant's Request to Charge No. 5 [R.391, T.686-702, 705/706, 714/715].

ENUMERATION OF ERROR NO. 24

The trial court erred in refusing to charge appellant's Request to Charge No. 6 [R.391, T.686-702, 705/706, 714/715].

ENUMERATION OF ERROR NO. 25

The trial court erred in refusing to charge

appellant's Request to Charge No. 7 [R.391, T.686-702, 705/706, 714/715].

ENUMERATION OF ERROR NO. 26

The trial court erred in refusing to charge appellant's Request to Charge No. 8 [R.391, T.686-702, 705/706, 714/715].

ENUMERATION OF ERROR NO. 27

The trial court erred in refusing to charge appellant's Request to Charge No. 9 [R.391/392, T.686-702, 705/706, 714/715].

ENUMERATION OF ERROR NO. 28

The trial court erred in refusing to charge appellant's Request to Charge No. 10 [R.392, T.686-702, 705/706, 714/715].

ENUMERATION OF ERROR NO. 29

The trial court erred in refusing to charge appellant's Request to Charge No. 11 [R.392, T.686-702, 705/706, 714/715].

ENUMERATION OF ERROR NO. 30

The trial court erred in refusing to charge appellant's Request to Charge No. 12 [R.392,

T.686-702, 705/706, 714/715].

ENUMERATION OF ERROR NO. 31

The trial court erred in refusing to charge appellant's Request to Charge No. 17 [R.396, T.686-702, 706, 714/715].

ENUMERATION OF ERROR NO. 32

The trial court erred in refusing to charge appellant's Request to Charge No. 18 [R.396, T.686-702, 706, 714/715].

ENUMERATION OF ERROR NO. 33

The trial court erred in refusing to charge appellant's Request to Charge No. 19 [R.396, T.686-702, 706/707, 714/715].

ENUMERATION OF ERROR NO. 34

The trial court erred in refusing to charge appellant's Request to Charge No. 21 [R.396, T.686-702, 707/708, 714/715].

ENUMERATION OF ERROR NO. 35

The trial court erred in refusing to charge appellant's Request to Charge No. 22 [R.397, T.686-702, 707/708, 714/715].

ENUMERATION OF ERROR NO. 36

The trial court erred in refusing to charge appellant's Request to Charge No. 24 [R.398, T.686-702, 708, 715].

ENUMERATION OF ERROR NO. 37

The trial court erred in refusing to charge appellant's Request to Charge No. 26 [R.398, T.686-702, 709, 714/715].

ENUMERATION OF ERROR NO. 38

The trial court erred in refusing to charge appellant's Request to Charge No. 27 [R.399, T.686-702, 709, 714/715].

ENUMERATION OF ERROR NO. 39

The trial court erred in refusing to charge appellant's Request to Charge No. 33 [R.402, T.686-702, 769, 714/715].

ENUMERATION OF ERROR NO. 40

The trial court erred in refusing to charge appellant's Request to Charge No. 48 [R.414, T.686-702, 711, 714/715].

ENUMERATION OF ERROR NO. 41

The trial court erred in refusing to charge

appellant's Request to Charge No. 49 [R.415, T.686-702, 711, 714/715].

ENUMERATION OF ERROR NO. 42

The trial court erred in refusing to charge appellant's Request to Charge No. 50 [R.415, T.686-702, 711/712, 714/715].

ENUMERATION OF ERROR NO. 43

The trial court erred in refusing to charge appellant's Request to Charge No. 51 [R. 415, T.686-702, 712, 714/715].

ENUMERATION OF ERROR NO. 44

The trial court erred in refusing to charge appellant's Request to Charge No. 52 [R. 415, T.686-702, 712, 714/715].

ENUMERATION OF ERROR NO. 45

The trial court erred in refusing to charge appellant's Request to Charge No. 55 [R.416, T.686-702, 713-715].

ENUMERATION OF ERROR NO. 46

The trial court erred in refusing to charge appellant's Request to Charge No. 56 [R.416,

T.686-702, 713-715].

ENUMERATION OF ERROR NO. 47

The trial court erred in its order [R. 477] of January 6, 1984, denying appellant's Motion for Reconsideration of Denial of Motion JNOV of December 9, 1983 [R. 449-476].

ENUMERATION OF ERROR NO. 48

The trial court erred in entry of Judgment [R. 421] for actual damages in a default case for more than was prayed for in appellees complaint [R. 11-39, 460-461] and as set forth in the Pre-trial Order [R. 345-350, T. 715-716].

ENUMERATION OF ERROR NO. 48 a

The trial court erred in entry of Judgment [R. 421] of an award of interest "eo nomine [R. 461, T. 715-716]."

ENUMERATION OF ERROR NO. 49

The trial court erred in entry of Judgment [R.421] of an award of attorney's fees for the time spent on appeals and discovery and related matters [R. 462, T. 449-470, 715/716].

ENUMERATION OF ERROR NO. 50

The trial court erred in rendering Judgment [R. 421] for the amount of One Million Dollars punitive damages which was clearly excessive and was the result of bias and prejudice toward the appellant [R.462-464, T. 1 /21/83 1-59].

ENUMERATION OF ERROR NO. 51

The trial court erred in its order of June 15, 1981 [R. 239] which held appellant in contempt of court.

ENUMERATION OF ERROR NO. 52

The trial court erred in its order of June 15, 1981 [R. 239], which ordered appellant to be incarcerated in jail for contempt of court.

ENUMERATION OF ERROR NO. 53

The trial court erred in its order of June 15, 1981 [R. 239] which struck appellant's defensive pleadings.

ENUMERATION OF ERROR NO. 54

The trial court erred in its order of May 4, 1981, entered May 8, 1981 [R. 224] directing appellant to answer certain questions on

deposition [R. 126-134].

ENUMERATION OF ERROR NO. 55

The verdict [R. 417] and judgment [R. 421] for legal malpractice is unsupported by the evidence and the court erred in refusing to grant appellant's Motion for Directed Verdict [T. 581, 582] and JNOV [R. 418-442].

ARGUMENT AND CITATION OF AUTHORITY

ENUMERATION OF ERRORS 1, 2, 3, 4, 5, 6, 7, 8, 11, 15, 20,21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 33, 34, 35, 36, 43, 44, 47

What the Court has before it is an action that should have never been tried against the appellant! Appellees have pleaded an action against the public policies of the State of Georgia.

The appellees in their complaint [R. 11-39] allege that they had on deposit in the bank over Three Hundred Thousand Dollars that came from Brown & Root and some other monies that did not originate with Brown & Root [R. 13].

They alleged that the written contract [R.

24] with appellant, the assignments [R. 25-34] and deeds [R. 36-38] were nothing but "sham" documents to cover their true contract which was oral and provided that appellant would assist them in hiding and concealing not only their assets but the funds taken from Brown & Root. Appellees further allege that appellant breached his fiduciary duty to assist them in concealing their assets, and instead, insisted that the written contract was the true contract that was in force and effect and denied the existence of the oral contract.

Both appellees testified during the trial of the case that the purpose for signing the written contract and the conveyances of real estate and personal property was to hide their assets and those of Brown & Root from Brown & Root [T. 281, 321, 329, 330, 331, 360, 405, 406, 417, 418]. Margaret Carlin testified that appellant "..was to give us deeds back immediately. We were not going to record them until he told us it was <u>safe</u> to." [T. 331]. And Stan

Carlin responded when asked if the purpose of the transfer was to hide it from Brown & Root? "Yes." [T. 406] Appellees also complain that appellant had breached his fiduciary duty in failing to abide by the oral contract to do just that. Although the appellant vehemently denies the allegations of the appellees, the question to be decided by this court is:

CAN AN ILLEGAL, IMMORAL AND VOID CONTACT WHICH IS AGAINST THE PUBLIC POLICY OF THE STATE OF GEORGIA, BE THE BASIS FOR A SUCCESSFUL SUIT AGAINST THE APPELLANT?

IS AN ORAL CONTACT TO VIOLATE THE LAWS AND PUBLIC POLICY OF THE STATE OF GEORGIA ENFORCEABLE BY ANY PERSON IN A COURT OF LAW OR EQUITY?

DOES AN ATTORNEY EVER HAVE A FIDUCIARY DUTY TO VIOLATE THE LAWS AND PUBLIC POLICY OF THE STATE OF GEORGIA?

The law of Georgia provides:

Georgia Code Ann. 28-201:

"ENUMERATION OF VOID ACTS.

The following acts by debtors shall be fraudulent in law against creditors and others, and as to them null and void, viz:....

2. Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description, had or made with intention to delay or defraud creditors, and such intention known to the party taking...".

Georgia Code Ann. 20-501, provides:

"CONTRACTS TO DO IMMORAL OR ILLEGAL THING

A contract to do an immoral or illegal thing is void. If the contract be severable, that which is legal will not be annulled by that which is illegal."

"Contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent can not be made the grounds of a successful suit."

Robinson v. Reynolds, 194 Ga. Rep. 324.

Such averments by appellees that said deeds were to be reconveyed to them after an end to the expected litigation with Brown & Poot, Inc., and that the defendant was to withdraw monies paid to appellees by Brown & Root from their checkings and savings accounts and immediately return the money to them along with the allegation that the written contract entered into between appellees and appellant was in effect a "sham" contract and the true contract between them was oral are all allegations of fraudulent conduct to defraud creditors.

Reynolds v. Reynolds, 238 Ga. Rep. 1 at 4:

"'The maxim...he who comes into equity must come with clean hands,...assumes that the suitor asking the aid of the court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject matter or transaction in question. It says that whenever a party, who, as actor, seeks to set

the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' In Section 401 illustrations are given for application of the principle where the plaintiff's claim is affected by his own fraud. It is said: 'If a contract has been entered into through fraud, or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the fraudulent parties--a particeps doli, while the agreement is still executory , either compel its execution or decree it cancellation, nor, after it has been executed, set it aside, and thus restore the plaintiff to the property or other interests which he had fraudulently transferred. Equity will leave such parties in exactly the position in which they have placed themselves,

refusing all affirmative aid to either of the fraudulent participants."

In Smith, executrix, v. Nix, 206 Ga. Rep. 403, where persons had conspired to obtain a liquor license in violation of the law at 407 an action was not allowed.

Rehak v. Mathis, 239 Ga. Rep. 541 (1977), where the plaintiff sued defendant for $100 per month for the eighteen years she lived with him and took care of him and where the "pleadings in this case conclusively show that all property and monetary claims asserted thereon are based upon a meretricious relationship, which claims are not recoverable because contrary to the public policy of this State" the Court held at page 543:

"It is well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration. Ga. Code Ann. 20-501; Wellmaker v. Roberts, 213 Ga. 740, 101 S. E. 2d 712 (1958); Watkins v. Nugen, 118 Ga.

372, 45 S. E. 262 (1003)."

In Wellmaker, supra, the Court held:

"Since, under the plaintiff's own testimony, an agreement between her and the defendant to engage in illicit sexual relations formed a part of the contract relied upon by her as the basis for the recovery, the contract was void as being based upon an illegal and immoral consideration {Prestell v. Rivers, 112 Ga. 850, 38 S. E. 109, Watkins v. Nugen, supra.} and 'Neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration.'"

Chief Justice Russell writing for the Court in Bryson v. Keith, 186 Ga. Rep. 616 at 618:

"As it appears from the petition that the basis of the contract was an immoral consideration, the court did not err in sustaining the demurrer.

Where a piano was sold for use in a lewd house, the vendor could not recover for the

payments due him because the law would not help him assert any rights that he had and stated as follows:

Harris v. Barfield Music House, 18 Ga. App. 444:

"'As women, they are entitled to eat and drink, dress and be sheltered as others, but no one, at the risk of loss to themselves, must furnish any of these comforts or supplies for the purpose of exciting, encouraging or aiding these harlots to commit a crime; for if they do, and the jury so finds, they will and ought to lose their money. For the maxim ex turpi causa non oritur actio is as old as the law."

The above maxim is translated from Ballentine's Law Dictionary, Third Edition and states as follows:

"No cause of action can arise out of immoral (or illegal) inducement (or consideration)."

In McAndrew v. Taylor, 15 Ga. App. 555, where the parties thereto conspired to defraud

creditors of the corporation, the Court held at 557:

"'A court of justice will not lend its aid to the enforcement of any contract the making of which is prohibited, nor to the enforcement of anything which is necessary to complete the accomplishment of an unlawful purpose.' "'A court will not lend its aid to a party who, as the ground of his claim, must disclose an illegal transaction.' And this means that whenever either either party has to rely upon a contract which is in fact illegal, the other party may, in avoidance of it, show its illegality. Garison v. Burns, 98 Ga. 762, 765 (26 s. E. 471). The plaintiff in the present case not only relies upon the contract, but he had to bring it to light as the basis of his suit, and the evidence illustrated and disclosed its real nature and effect to be an attempt on the part of two shareholders in an insolvent corporation to divide, for their own personal benefit, assets liable to the claims of

creditors. This gave the defendant the right to invoke the rule that the court should leave them where it found them."

"'If, from the plaintiff's own statement or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, then the court says he has no right to be assisted.'"

Although appellant went to trial in default, that does not make a void contract viable and appellant was entitled to have consideration given to the fact that the appellees' cause of action was based upon an illegal contract and that appellees had come into court with "unclean hands."

Appellant's defensive pleadings may have been stricken but even had he not raised the defense, the Supreme Court has held as in McKinney v. Atkinson, et al., 209 Ga. Rep. 49 that:

"The defendants need not invoke the clean hands maxim, as the court will apply it on its own accord."

In Lewis v. Foy, 189 Ga. Rep. 596 at 601, where the party accused her attorney of fraud by advising her to sign a document representing it to be one thing when in reality it was another, the Court held:

"It is essential to all business relationships that the validity and solemnity of written contracts, freely and voluntarily executed, be upheld. It would be tragic if all such contracts were jeopardized by a rule of law that would permit one of the parties thereto, because of dissatisfaction therewith, to go into court and by oral testimony establish conduct short of fraud and reasonable diligence obtain nullification of a written contract. If the plaintiff signed the deed here involved without knowing it contents, it was due to her own negligence and the responsibility of hers and she must abide by the contract as signed."

See also Langan v. Langan, 224 Ga. 399 (1968).

ENUMERATION OF ERRORS 17, 18, 26, 32, 40, 41, 42 45, 46, 47

Appellees argue that the "hiding of the assets" was upon the advice of the appellant at the time the employment contract was entered into.

There can be no attorney--client relationship until there is an employment of the attorney.

Mann v. Showalter, 145 Ga. Rep. 268, 272:

"This rule, however, relates to contracts pending the relation of attorney and client, and affected by the confidence growing out of the relation; not to a contract made for the purpose of employing an attorney. A person desiring to employ an attorney may agree with him upon the terms of the employment and the fees to be charged; and, as to such contract, the burden is not cast upon the attorney to show, in the first instance, both the contract and its fairness and

freedom from fraud."..."But before the relation of attorney and client has arisen, it can not properly be presumed, as a matter of law, that the attorney has obtained such an ascendency of influence over the client that proof of the contract will along cast any burden of proof upon the attorney to establish its fairness. Practically there could be no binding contract for an attorney to represent a client on a contingent fee, if every such contract required additional evidence to support it, in order to be even prima facie valid. Of course such contracts, like contracts generally, may be attacked for fraud. So after the termination of the relation, or where the parties deal expressly or clearly at arm's length, no such burden rests on the attorney."

See also Bank of Lumpkin v. Farmers State Bank, 161 Ga. Rep. 801 at 816, 132 S. E. 221.

ENUMERATION OF ERRORS 13, 14

At trial, Stan Carlin testified that he had only had charges brought against him twice [T.

356], one was Interstate Theft of Stolen Securities and Interstate Theft of Stolen Motor Vehicles. When appellant attempted to cross examine him and to prove that he had had other charges brought against him for impeachment purposes, the Court would not allow such cross examination [T. 421, 438]. Neither would the Court allow appellant to introduce evidence for impeachment purposes [T. 572]. O.C.G.A. 24-9-82 provide how a witness is impeached by disproving testimony.

ENUMERATION OF ERROR NO. 16

At trial, defendant, an attorney present at the counsel table with his hired attorney, wanted to participate in the trial of the case by making one of the closing arguments [T. 584]. The Court refused to allow him to do so resulting in a violation of his rights under the Constitution of the State of Georgia which provided in Art. I, Sec. I, Para. 9 a right to the Courts (Ga. Code Ann. 2-109). "No person shall be deprived of the right to prosecute or defend

his own cause in any of the courts of this state, in person, by attorney, or both." Which denied his similar rights under the United States Constitution 6th Amendment. The denial of which will entitle appellant to a new trial. See Heard, Leverette and Adams, P.C. v. Stone, 167 Ga. App. 113, 306 S. E. 2d 72.

ENUMERATION OF ERROR NO. 6, 24

The gun collection that appellees complain of was a collection that Stan Carlin had acquired after being a convicted felon in 1963 and his civil rights had never been restored [T. 421]. Margaret Carlin testified that Stan had given the guns to her in 1974 [T. 257]. It is the law of the United States that if a convicted felon purchases or possesses a gun after a conviction that said gun or guns are contraband, title to which automatically vest with the United States of America and one may not give title or sell title to another person including his wife. U. S. v. One 6.5 MM Mannlicher-Carcano Military Rifle, D. C. Tex., 1966, 250

F. Supp. 410. Title 18 U.S.C. 921, 18 U.S.C. 1201-1203.

ENUMERATION OF ERROR NO. 9

A counter-claim is not a defense and should not have been stricken. Appellant should have been allowed to proceed on his counter-claim. E.G.L., Vol. 24, section 96, Ga. Practice & Procedure.

ENUMERATION OF ERROR NO. 10, 51, 52, 53, 54

Art. I, Sec. I, Para. XIII, of the Constitution of the State of Georgia provides that no person shall be compelled to give testimony tending in any manner to criminate himself. Ga. Code Ann. 38-417, 38-1102. Appellant shows that his objections under these sections have never been addressed by the appellate courts in this matter and appellant asserts that the striking of his defensive pleadings was a denial of his rights under the 5th and 14th Amendments to the United States Constitution of the United States.

ENUMERATION OF ERRORS 37, 50

The award of damages is to compensate the plaintiff for any damages sustained and not to unreasonably burden the defendant beyond the point of compensating the plaintiff and no consideration should be given at to which party could better bear the loss. Ga. Power Co. v. Womble, 150 Ga. App. 28, 256 S. E. 2d 640 (1979).

ENUMERATION OF ERROR NO. 39

Appellees have admitted certain facts, which if true, would completely bar any right of recovery against appellant. An admission in open court or pleadings is a solemn admission in judicio and are binding upon said parties. Londeau v. Davis, et al., 136 Ga. App. 25 at 29

ENUMERATION OF ERROR NO. 47, 48

The prayers for relief in complaints prayed for $36,000 [R. 22] and no interest. The Pretrial specified only $36,000 [R. 346-350] with no mention of interest. O.C.G.A. 9-11-54 (c) (1) provides that a judgment by default shall

not be different in kind from or exceed in amount that prayed for in the demand for judgment. When the judgment exceeds the demand, it is to that extent a nullity. Hall County Bd. of Tax Assessors v. Reed, 142 Ga. App. 556, 236 S. E. 2d 532 (1977); Orkin Exterminating Co. v. Townsend, 136 Ga. App. 50, 220 S. E. 2d 14 (1975); Dempsey v. Ellington, 125 Ga. App. 707, 188 S.E.2d 908; Leverett v. Moran, 153 Ga. App. 825, 266 S.E.2d 574; Ga. Farm Bureau Mutual Ins. Co. v. Williams, 124 Ga. App. 549, 184 S. E. 2d 665.

ENUMERATION OF ERROR NO. 47, 48a

The jury awarded $19,949.00 of interest at the 10% per annum as clearly set forth in their Verdict.

In action for breach of contract, where damages are not liquidated, or in an ex delicto action, interest is not recoverable as such, eo nomine; but the jury may increase the amount of damages. Jones v. Spindel, 122 Ga. App. 390, 177 S.E.2d 187; United States ex rel. Delta

Metals, Inc. v. R. M. Wells Co., 497 F. Supp. 541 (S.D. Ga. 1980); Eastern Fed. Corp. v. Avco-Embasy Pictures Corp., 331 F. Supp. 1253 (N.D. Ga. 1971).

The jury verdict shows that the interest was computed at the rate of 10% per annum. See also O.C.G.A., 7-4-2. The Plaintiffs did not give any notice to Defendant pursuant to O.C.G.A., 51-12-14.

ENUMERATION OF ERRORS 47, 49

This action originated and was based upon an illegal oral contract alleged in Plaintiffs' complaint. The jury awarded attorney's fees in the amount of $75,000.00. Such is an illegal award and may not be made.

Attorney Taylor Jones in giving evidence as to attorney's fees detailed time spent on appeals and discovery. Such fees are based upon the parties conduct during the litigation and are not recoverable. The allowance of attorney's fees based upon a parties conduct during litigation is totally improper. See

Padgett v. Moran, No. 66111, Ga. Court of Appeals, 306 S.E.2d 96 (1983).

ENUMERATION OF ERRORS 47, 50

This case went to trial as a default case. Because Defendant believed a stay was in existence and was out of state, Defendant was not present for the first one and one half days of the trial this, and because Defendant was not able to assert a defense prejudiced the jury. The award of ONE MILLION DOLLARS punitive damages is not only legally unauthorized, but clearly excessive. See Jones v. Spindel, 122 Ga. App. 390, 177 S.E.2d 187 where it was held that an award of $30,000.00 actual damages did not justify an award of $29,170.00 for punitive damages and interest appeared to "... be indicative of an undue bias for the plaintiff and against the defendants, which sets up a penalty which is unreasonable under the standards set forth in Code 105-2002,..."

"the size of the verdict being itself a circumstance which suggests the possibility of

bias or mistake, the reviewing court scans the record closely to see if this suspicion finds corroboration in any cause that might have induced such a result." Seaboard Air Line Ry. v. Miller, 5 Ga. App. 402, 63 S.E. 229 (1908).

The jury was wilfully mislead as to the existence of certain facts which were simply not true.

ENUMERATION OF ERROR NO. 12

Most of the portions of appellant's deposition read into the record by the appellees was irrelevant, immaterial and very prejudicial to the appellant. The pretrial order [R. 346-350] limited the evidence to that of items of damage. Most of the portions addressed no damages.

ENUMERATION OF ERROR NO. 19

The court should not have directed that the jury cancel the deed on the appellees' house over the objection of the appellant.

ENUMERATION OF ERROR NO. 55

"In malpractice actions against attorneys, as is the case against other professionals, it

is essential that competent evidence be presented as to the acceptability of particular conduct." "Hence, except in clear and palpable cases...expert testimony is necessary to establish the prameters of acceptable professional conduct, a significant deviation from which would constitute malpractice. Berman v. Rubin, 138 Ga. App. 849, 227 S.. E. 2d 802 (1976).

CONCLUSION

If every thing alleged by the Carlins was taking as totally true all the testimony of Stan and Margaret Carlin, one fact stands out--Stan Carlin was trying to hide assets from Brown & Root Inc. <T.405-405> who was trying to recover the money stolen from them. Margaret Carlin also knew <T. 283 & 284> the purpose of the deeds and assignment of bank accounts <T. 328-231>.

See Gowen v. Georgia International Life Insurance Company, 163 Ga. 75, 293 S.E.2d 729 (1983).

For the reasons herein, judgment should be reversed.

Respectfully submitted,

/s_____
FLETCHER THOMSPON, Attorney for Appellant

/s_____
LARRY COHRAN, Attorney for Appellant

F-1

|Filed December 7, 1983|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN Plaintiffs	)	CIVIL ACTION NO. 793686
vs.	)	
LARRY COHRAN, Defendant	)	
vs.	)	
TAYLOR W. Jones, et al., Third-Party Defendants	)	

O R D E R

The above captioned case having come on for a hearing on November 21, 1983, on Defendant's Motion For Judgment Notwithstanding the Verdict and after hearing oral argument of counsel for both sides, reviewing the transcript, briefs and other pertinent parts of the record, it is;

HEREBY ORDERED, that as Plaintiffs' complaint sounds in tort and fraud, the defensive pleadings having been stricken and allegations that the claims were against public policy any conflicting testimony would go to impeachment and credibility of the witnesses rather than failure to present a prima facia case. Said conflicting evidence was properly a question of fact ultimately resolved by the jury. Therefore, Defendant's Motion For Judgment Notwithstanding the Verdict shall be and the same is hereby overruled.

SO ORDERED, this 2nd day of December, 1983.

s/

ARTHUR W. FUDGER, JUDGE
TALLAPOOSA JUDICIAL CIRCUIT
PRESIDING AS JUDGE COBB JUDICIAL CIRCUIT

C-1

|Filed June 23, 1983|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 793686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	
vs.	)	
TAYLOR W. Jones, et al.,	)	
Third-Party Defendants	)	

JUDGMENT

In accordance with the verdict of the jury returned in this case June 16, 1983, judgment is hereby entered in favor of the Plaintiffs, STAN CARLIN and MARGARET A. CARLIN, and against the Defendant, LARRY COHRAN, in the sums of actual damages in the amount of FORTY-FIVE THOUSAND SEVEN

DOLLARS ($45,007.00), plus interest in the amount of NINETEEN THOUSAND NINE HUNDRED FORTY-NINE DOLLARS ($19,949.00), plus attorneys' fees in the amount of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00), plus punitive damages in the amount of ONE MILLION DOLLARS ($1,000,000.00), for a total judgment in the amount of ONE MILLION ONE HUNDRED THIRTY-NINE THOUSAND NINE HUNDRED FIFTY-SIX DOLLARS ($1,139,956.00), plus the costs of this proceeding.

It is further ORDERED AND ADJUDGED that the following deeds, recorded on the Deed Records of the Clerk of the Superior Court of Cobb County, are hereby declared NULL AND VOID: (a) a warranty deed from Stan Carlin and Margaret A. Carlin, dated April 2, 1978, recorded April 9, 1979, in Deed Book 1989, page 423; (b) a warranty deed from Stan Carlin and Margaret A.

Carlin to Larry Cohran, dated April 2, 1978, and recorded April 9, 1979, in Deed Book 1989, page 424, and (c) a deed to secure debt from Bobby J. Roberts to Larry Cohran dated June 18, 1979, and recorded June 19, 1979, in Deed Book 2028, page 155-157. The Clerk of the Superior Court of Cobb County IS ORDERED to enter on the aforesaid deed records that said deeds are declared NULL AND VOID and canceled by order of this court entered this date in the above-styled action.

Nunc pro tunc, this 16th day of June, 1983.

s/ (6/20/83)

ARTHUR W. FUDGER,
JUDGE, SUPERIOR COURT,
TALLAPOOSA JUDICIAL
CIRCUIT PRESIDING AS
JUDGE, COBB SUPERIOR
COURT

H-1

|Filed June 16, 1983|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	

VERDICT

We the Jury award to the plaintiffs the sum of $45,007 as actual damages plus $19,949 of interest computed on the savings and cash amounts included in the $45,007 at a rate of approximately 10% simple per annum for a combined total of $64,956.

This 16th day of June, 1983.

s/Thomas G. Boren
FOREMAN

We the Jury award to the plaintiffs

and find that the deeds from plaintiffs to defendant be annulled and set aside as to certain real property as follows:

The Indian Hills lot located in Cobb County, Georgia; the Wicks Lake Subdivision lot located in Cobb County, Georgia; and the lot located in Lee County, Florida.

This 16th day of June, 1983.

s/Thomas G. Boren
FOREMAN

We the Jury award to the plaintiffs the sum of $75,000 as reasonable attorneys' fees.

This 16th day of June, 1983.

s/Thomas G. Boren
FOREMAN

We the Jury award to the plaintiffs the sum of $1,000,000 as punitive damages.

This 16th day of June, 1983.

s/Thomas G. Boren
FOREMAN

I-1

|Filed August 23, 1979|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 793686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	
vs.	)	
TAYLOR W. Jones, et al.,	)	
Third-Party Defendants	)	

C O M P L A I N T

COME NOW, STAN CARLIN and MARGARET A CARLIN, the Plaintiffs, and state their Complaint against LARRY COHRAN, the Defendant, as follows:

COUNT I

I-2

1.

The Defendant, Larry Cohran, is a resident of Cobb County, Georgia, can be served with process at his office at 2931 Cobb Parkway, Suite 206, Atlanta, Cobb County, Georgia, and is subject to the jurisdiction of this Court.

2.

At all times relevant to the events described in this Complaint, Plaintiff has been and is a member of the State Bar of Georgia, engaged in the full time practice of law with an office and place of business in Cobb County, Georgia.

3.

Prior to March 1979 Plaintiffs had employed Defendant to act as their attorney on several occasions and had established an attorney-client relationship with Defendant.

4.

On or about March 29, 1979, Plaintiff Stan Carlin was arrested on criminal charges arising out of financial transactions with Brown & Root, Inc., a Texas Corporation. Soon after Plaintiff's arrest and confinement in the Fulton County jail, Plaintiffs contacted Defendant to secure his services in arranging for Plaintiff Stan Carlin to be released on bond and to represent Plaintiff in his defense against said criminal charges.

5.

On or about April 1, 1979, Defendant visited Plaintiff Stan Carlin in the Fulton County jail and it was agreed that Defendant would represent Plaintiff in connection with said criminal charges for an agreed upon attorney's fee in the amount of Sixty Dollars ($60.00) per hour plus out-of-pocket expenses, with an

advance retainer in an amount not yet agreed upon at that time. Later the same day, Plaintiff Margaret A. Carlin paid t o Defendant the sum of (One Thousand Dollars ($1,000.00) on account.

6.

At the time of Plaintiff Stan Carlin's arrest on March 29, 1979, Plaintiff had on deposit in a personal checking account in Fulton National Bank a sum of money in excess of Three hundred Thousand Dollars ($300,000.00) which Plaintiff had received in the form of checks from Brown & Root, Inc. Plaintiffs also had on deposit in several other checking and savings accounts substantial sums of money which did not originate from Brown & Root, Inc.

7.

On or about April 2, 1979, Defendant again visited Plaintiff Stan Carlin in the Fulton County jail and brought with him several blank warranty deed forms, a purported employment contract, ten separate documents purporting to transfer and assign to Defendant all the funds on deposit in ten checking and savings accounts maintained by Plaintiffs in several banks and savings and loan associations, and a purported power of attorney authorizing Defendant to secure and take possession of all money, real and personal property, and other assets owned by Plaintiffs.

8.

When Defendant presented the aforesaid purported employment contract, blank deeds, checking and savings account assignments, and power of attorney to

Plaintiff Stan Carlin, Defendant represented to Plaintiff that Brown & Root, Inc., would take everything whether Plaintiff Stan Carlin was guilty or not, that a lien for attorney's fees in favor of Defendant would take priority over the liens to be asserted by Brown & Root, Inc., and that it was a legal and proper procedure to protect Plaintiffs' assets by conveying all of said assets to Defendant as legal fees. Defendant assured Plaintiffs that even though the purported employment contract provided for a fee of One Million Dollars ($1,000,000.00), the actual fee to be paid would be Sixty Dollars ($60.00) per hour. Defendant further assured Plaintiffs that it was legally proper and necessary for their protection for them to execute three blank warranty deed forms after which Defendant would fill in the descriptions of the

three parcels of real estate owned by Plaintiffs, record the deeds, and immediately execute deeds back to Plaintiffs, which Plaintiffs should not file for record until after the conclusion of the expected litigation with Brown & Root, Inc. Defendant further advised Plaintiffs that it was necessary to use the assignments and power of attorney to withdraw funds from Plaintiffs' checking and savings accounts to prevent the seizure of said funds by Brown & Root, Inc., and that Defendant would deliver all such funds to Plaintiffs immediately after they were withdrawn from the checking and savings accounts.

9.

The aforesaid representations by Defendant were false and fraudulent and were made not for the purpose of protecting Plaintiffs' assets, but rather for the

purpose of enabling Defendant to cheat and swindle Plaintiffs and convert all of Plaintiffs' assets to the use and benefit of Defendant.

10.

In reliance upon the aforesaid false and fraudulent representations to Defendant, Plaintiffs did sign the purported employment contract, a copy of which is annexed hereto as Exhibit A, ten assignments of checking and savings accounts, copies of which are annexed hereto as Exhibits B, C, D, E, F, G, H, I, J, and K, and the power of attorney, a copy of which is annexed hereto as Exhibit L. Plaintiffs also signed three blank warranty deed forms which Defendnat subsequently had witnessed and notarized and filled in with descriptions of Plaintiffs' house, another parcel of property owned by

Plaintiffs in Cobb County, Georgia, and a third parcel of property owned by Plaintiffs in Fort Myers, Lee County, Florida. The warranty deeds purporting to convey title to Plaintiffs' house and Plaintiffs' other property in Cobb County have been recorded by Defendant on the Cobb County deed records and copies thereof are annexed hereto as Exhibits M and N. Plaintiff has no copy of the third deed as of the time of the filing of this Complaint, but alleges on information and belief that the same has been filed on the deed records of Lee County, Florida. A copy of Plaintiffs' deed containing the description of the Lee County, Florida, property is annexed hereto as Exhibit O.

11.

In addition to the hereinabove described deeds and the documents fraudulently obtained from Plaintiffs by Defen-

dant, Plaintiffs paid to Defendant One Thousand Dollars ($1,000.00) cash on or about April 1, 1979, and Ten Thousand Dollars ($10,000.00) cash on or about April 3, 1979, which sums were demanded and received by Defendant as advance payment of legal fees. In addition to said cash payments, Defendant used the fraudulently obtained assignments and other documents to obtain possession of checks and other funds belonging to Plaintiffs in the amount of an additional Twenty Five Thousand Dollars ($25,000.00), amounting to total cash payments to Defendant from funds belonging to Plaintiffs in a sum slightly in excess of Thirty Six Thousand Dollars ($36,000.00).

12.

In addition to the hereinabove

described deeds and other documents and payments of large sums of money fraudulently obtained from Plaintiffs, Defendant also advised Plaintiffs that Plaintiffs' house would probably be searched by law enforcement officers who would confiscate Plaintiffs' valuable gun collection. In order to avoid such confiscation, Defendant advised Plaintiffs to turn said gun collection over to Defendant immediately and Plaintiff Stan Carlin's brother or father could pick up the collection at their convenience. In reliance upon said advice, Plaintiff Margaret A. Carlin did, on or about April 3, 1979, allow Defendant to come to Plaintiffs' house and take possession of Plaintiffs' gun collection consisting of 51 guns, many of which were antiques or rare collector's items. Having fraudulently obtained possession of Plaintiffs' gun collection, Defendant con-

verted the same to his own use and now refuses to return said collection or disclose its whereabouts to Plaintiffs.

13.

On June 3, 1979, Plaintiffs discharged Defendant as their attorney. Because of Defendant's breach of his employment contract with Plaintiffs and breach of his fiduciary duty to Plaintiffs, and Defendant's failure to render any legal services of any benefit or value to Plaintiffs, Defendant is entitled to no compensation for his legal representation of Plaintiffs between April 1 and June 3, 1979.

14.

Plaintiffs show that the deeds purporting to convey to Defendant title to Plaintiffs' Cobb County properties, copies of which are annexed hereto as Exhibits M and N, were fraudulently procured, were

signed in blank and improperly witnessed and notarized, were not supported by any consideration flowing from the grantee to the grantors, and are therefore null and void Said deeds cast a cloud on Plaintiffs' title to the properties described therein and should be cancelled and declared null and void, and title to the properties described therein decreed to be in Plaintiffs, subject only to valid encumbrances existing prior to April 2, 1979.

15.

Plaintiffs show that any further conveyances of Plaintiffs' Cobb County, Georgia, properties or Lee County, Florida, property, would further cloud Plaintiffs' title to said properties and result in a multiplicity of suits to set aside any such conveyances. Plaintiffs show that any further expenditure, encum-

brance, or transfer of ownership, possession or location of the monies obtained from Plaintiffs or Plaintiffs' gun collection would compound the effects of Defendant's fraudulent conduct and frustrate Plaintiffs' efforts to regain possession of said monies and gun collection wrongfully held by Defendant. Plaintiffs have no adequate remedy at law and show that Defendant should be temporarily restrained and permanently enjoined from assigning, transferring, conveying, or encumbering Plaintiffs' real properties in Cobb County, Georgia and Lee County, Florida, and from assigning, transferring, conveying, pledging, spending, disposing of or changing the location of any of the monies obtained from Plaintiffs or Plaintiffs' gun collection.

16.

Because of the aforesaid breach

of contract, breach of fiduciary duty, and fraud of Defendant, Plaintiffs are entitled to judgment against Defendant in the amount of Thirty Six Thousand Dollars ($36,000.00) plus any additional sums of Plaintiffs' money Plaintiffs discover to have been converted and misappropriated by Defendant, plus a judgment in trevor for the return of Plaintiff's gun collection, or if the gun collection cannot be recovered, for the reasonable value thereof.

17.

Plaintiffs show that the aforesaid acts and conduct of Defendant constitute fraud, bad faith, breach of Defendant's fiduciary duty to Plaintiffs, and deliberate theft of Plaintiffs' properties, monies, guns, and other assets, by reason of which Plaintiffs are entitled to recover from Defendant punitive damages in the amount of One Million Dollars

($1,000,000.00) plus reasonable attorney's fees in an amount to be shown upon the trial of this case.

COUNT II

18.

Plaintiffs adopt and incorporate Paragraphs 1 through 13 of Count 1 of this Complaint as if they were restated herein verbatim.

19.

Plaintiffs show that from April 1 through June 3, 1979, while claiming to be rendering skillful and valuable legal service in behalf of Plaintiff Stan Carlin in the case of United States vs. Stan Carlin, Criminal Action Number 79-117A, United States District Court for the

Northern District of Georia, Defendant negligently and improperly represented Plaintiff in the following particulars:

(a) Defendant falsely represented to Plaintiff that Defendant had a sufficient degree of skill and expertise in similar cases to provide competent and skillful representation in defending Plaintiff with respect to the criminal charges pending against him.

(b) Defendant negligently failed to appear at a commitment hearing in the City of Atlanta police court on the afternoon of March 30, 1979.

(c) Defendant negligently failed to appear at a commitment and bond hearing before a U.S. Magistrate on the afternoon of March 30, 1979.

(d) Detendant negligently and improperly allowed Plaintiff to remain in jail from March 30 until April 6, 1979, by

failing to apply for and obtain a bond reduction and arrange for the posting of bond to secure Plaintiff's release.

(e) Defendant negligently and improperly filed a civil complaint against Brown & Root, Inc., thereby subjecting Plaintiff to a counterclaim concerning which Plaintiff could not assert his constitutional right of refusing to testify on the grounds of possible self-incrimination, thereby seriously jeopardizing Plaintiff's defense to the criminal charges pending against him.

(f) Defendant lost, misplaced, or intentionally disposed of certain signed receipts for finder's fees paid to one or more third parties relating to Plaintiff's dealings with Brown & Root, Inc., thereby seriously weakening one of Plaintiff's primary defenses to the criminal charges and jeopardizing Plaintiff's

entire defense against said charges.

20.

Plaintiffs show that from April 1 through June 3, 1979, while claiming to be rendering skillful and valuable legal services to Plaintiffs in the cases of Stan Carlin vs. Brown & Root, Inc., Civil Action Number C-79-632A, United States District Court for the Northern District of Georgia (originally filed in the Superior Court of Cobb County), and the cases of First National Bank of Cobb County vs. M. A. Carlin, et. al., and Fulton National Bank of Atlanta vs. M. A. Carlin, et. al., Civil Action Numbers C-79-696A and C-79-739A, United States District Court for the Northern District of Georgia, Defendant negligently and improperly represented Plaintiffs in the following particulars:

(a) Defendant falsely represented to Plaintiffs that Defendant had a sufficient degree of skill and expertise in similar cases to provide competent and skillful representation of Plaintiffs in said cases.

(b) Defendant negligently and improperly advised Plaintiff Stan Carlin to file, and did file, on behalf of Plaintiff Stan Carlin, a Complaint against Brown & Root, Inc., in the Superior Court of Cobb County, the filing of which Complaint was not authorized by Plaintiff and was not in the best interest of Plaintiff.

(c) Defendant falsely and improperly advised Plaintiff Stan Carlin that Defendant had "connections" with one or more judges of the Cobb County Superior Court so that when Defendant filed suit on behalf of Plaintiff Stan Carlin against Brown & Root, Inc., in the Superior Court

of Cobb County, it would be taken care of to the benefit of Plaintiff.

(d) Defendant negligently and improperly failed to advise Plaintiff Stan Carlin that Brown & Root, Inc., could and would remove a suit filed in the Superior Court of Cobb County to the United States District Court for the Northern District of Georgia, thereby nullifying the benefit of whatever "connections", if any, Defendant had with one or more judges of the Superior Court of Cobb County.

(e) Defendant advised and counseled Plaintiff to participate in a fraudulent scheme to create and falsify a bogus contract to be used in suing Brown & Root, Inc., for breach of contract.

(f) Detendant negligently and improperly failed to comply with the rules of the United States District Court for

the Northern District of Georgia concerning the timeliness and filing of certain pleadings in Civil Action C-79-632A, thereby subjecting Plaintiff Stan Carlin to the risk of a default judgment being entered against him in said case.

21.

Because of aforesaid acts of negligence, improper conduct and professional malpractice of Defendant, Plaintiffs have been damaged in amounts not presently ascertainable, but which Plaintiffs believe will exceed One Hundred Thousand Dollars ($100,000.00) for Plaintiff Stan Carlin and Fifty Thousand Dollars ($50,000.00) for Plaintiff Margaret A. Carlin, which amounts Plaintiffs will prove upon the trial of this case.

22.

On June 3, 1979, Plaintiffs discharged Defendant as their attorney.

Because of Defendant's breach of his contract with Plaintiffs, breach of his fiduciary duty to Plaintiffs, failure to render any legal services of any benefit or value to Plaintiffs, and professional malpractice in connection with his purported representation of Plaintiffs, Defendant is entitled to no compensation for his representation of Plaintiffs between April 1 and June 3, 1979.

23.

Plaintiffs show that the aforesaid acts and conduct of Defendant constitute fraud, had faith, stubborn and litigious conduct, and deliberate professional malpractice, by reason of which Plaintiffs are entitled to recover from Defendant punitive damages in the amount of One Million Dollars ($1,000,000.00) plus reasonable attorney's fees in an amount to be shown upon the trial of this case.

WHEREFORE, on Count 1 of this Complaint Plaintiffs pray as follows:

(a) That Defendant be temporarily restrained and permanently enjoined from assigning, transferring, conveying, or encumbering Plaintiffs' real properties in Cobb County, Georgia, and Lee County, Florida, and from assigning, transferring, conveying, pledging, spending, disposing of or changing the location of any of the monies obtained from Plaintiffs or Plaintiffs' gun collection pending the outcome of this proceeding.

(b) That the purported warranty deeds, copies of which are annexed hereto as Exhibit M and Exhibit N, be cancelled and declared null and void and title to the properties described therein be decreed to be in Plaintiffs, subject only

to valid encumbrances existing prior to April 2, 1979.

(c) That Defendant be ordered to deliver to Plaintiff any purported warranty deed conveying title to Plaintiffs' property in Lee County, Florida, and if such a purported deed has been recorded on the deed records of Lee County, Florida, Defendant be ordered to reconvey said property to Plaintiffs.

(d) That Plaintiffs have judgment against Defendant in trover for the possession of Plaintiffs' entire gun collection consisting of 51 guns or, if said guns are not recoverable, that Plaintiffs have judgment against Defendant for the full value thereof in an amount to be shown upon the trial of this case.

(e) That Plaintiffs have judgment against Defendant for Thirty Six Thousand Dollars ($36,000.00) plus any

additional sums of Plaintiffs' money discovered to have been converted and misappropriated by Defendant.

(f) That Plaintiffs have judgment against Defendant for punitive damages in the amount of One Million Dollars ($1,000,000.00) plus attorney's fees in an amount to be shown upon the trial of this case.

(g) That Plaintiffs have such further and additional relief as the Court may deem just and proper.

WHEREFORE, on Count II of this Complaint Plaintiffs pray as follows:

(a) That Plaintiffs have judgment against Defendant for Thirty Six Thousand Dollars ($36,000.00) plus any additional sums of money discovered to have been converted and misappropriated by Defendant.

(b) That Plaintiffs have judgment against Defendant in trover for the possession of Plaintiffs' entire gun collection consisting of 51 guns or, if said guns are not recoverable, that Plaintiffs have judgment against Defendant for the full value thereof in an amount to be shown upon the trial of this case.

(c) That Plaintiff Stan Carlin have judgment against Defendant for damages suffered as a result of Defendant's professional malpractice in the amount of One Hundred Thousand Dollars ($100,000.00) or such greater or lesser amount proved by Plaintiff Stan Carlin upon the trial of this case.

(d) That Plaintiff Margaret A. Carlin have judgment against Defendant for damages suffered as a result of Defendant's professional malpractice in the amount of Fifty Thousand Dollars

($50,000.00) or such greater or lesser amount proved by Plaintiff Margaret A. Carlin upon the trial of this case.

(e) That Plaintiffs have judgment against Defendant for punitive damages in the amount of One Million Dollars ($1,000,000.00) plus attorney's fees in an amount to be shown upon the trial of this case.

JONES, LUDWICK & MALONE

BY: s/
Taylor W. Jones

BY: s/
Steven W. Ludwick

Attorneys for Plaintiffs

EMPLOYMENT CONTRACT

This CONTRACT made and entered into this 2nd day of April 1979 by and between LARRY COHRAN, Attorney at Law, party of the first part and STAN CARLIN and MARGARET ANN CARLIN also d/b/a STAN CARLIN & CO. and CARLIN LUMBER COMPANY, parties of the second part.

W I T N E S S E T H:

WHEREAS, the parties hereto desire to enter into this contract of emplnyment and

WHEREAS, the party of the first part agrees to represent parties of the secnnd part to the best of his ability and take whatever legal action he deems necessary and in consideration as hereinafter set forth; and

WHEREAS, the parties of the second part desire the party of the flrst part to represent them in their claim or cause of action against BROWN & ROOT of Texas and party of the first part expressly agrees to prosecute the parties of the second part's claim againat said BROWN & ROOT of Texas for "breach of contract" of a Sixteen Million Dollar sale of property rights to said BROWN & ROOT AND FURTHER agrees to prosecute any claim or cause of action against whomever party of the first part deems liable as a result of said transaction.

WHEREAS, the parties of the second part desire the party of the first part to represent them in all actions pending against them both jointly and severally or individually in the State of Georgia or

which might be pending against them one year from this date in the State of Georgia in both the State Courts and Fcdcral Courts in the State of Georgia and to do all things necessary in defending them in any criminal charges brought against them and in any of the charges brought against any of the abnve named entities which the parties assume might occur at this time. NOW THEREFORE, in consideration of the premises, and for the mutual promises of the parties, made each to the other, it is hereby covenanted and agreed as follows

1.

Party of the first part agrees to represent parties of the second part in any charges made against them as aet forth above and in their cause of action against BROWN & ROOT as set forth above and shall have exclusive control over all negotiations and litigation thereto.

2.

Parties of the second part agree to pay to party of the first part pursuant tn this retainer and employment a sum of ONE MILLION DOLLARS. It is recognized that party of the first part is entitled to his fee and if party of the first part does nnt continue his employment for parties nf the second part because parties of the secnnd part refuse to follow party of the first part's advice or releases party of the first part as their attorney then party of the first part is entitled to a portion of the fee mentioned above as his attorney's fees for the work done and this portion shall not be less than 50% of the said sum stated above.

I-31

3.

Parties of the second party hereby expressly authorize party of the first part to endorse any checks or drafts and sign their names to any releases drafts, checks or any other documents that party of the first part deems necessary in the scope of his employment.

4.

Parties of the second part agree that they are responsible for all litigation expenses such as depositions, court cost, investigations, etc.

Parties of the second part agree that party of the first part shall have a vested interest in the subject matters as set forth in this contract and be entitled to the fee hereinbefore set forth from thsi day forward.

[Right hand side]

s/ Margaret Ann Carlin
MARGARET ANN CARLIN

s/ Stan Carlin
STAN CARLIN
Parties of the second part

s/ Larry Cohran
LARRY COHRAN
Party of the first part

All signatures witnessed by Carol E. Bristol.

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. _____
vs.	)	
LARRY COHRAN,	)	
Defendant	)	

A F F I D A V I T

Personally appeared before the undersigned officer, duly authorized to administer oaths, STAN CARLIN and MARGARET A. CARLIN, the plaintiffs in the above-styled action, who, after being duly sworn, state and oppose on oath that the facts contained in the within and foregoing Complaint are true and correct.

s/_____
STAN CARLIN

s/_____
MARGARET A. CARLIN

Sworn to and subscribed
before me this 21st day of
August, 1979.

s/_____

DORIS K. BROOKS

NOTARY PUBLIC

J-1

TRANSCRIPT EXCERPTS ON OBJECTIONS TO PROCEEDING WITH TRIAL AND NON-ALLOWANCE OF COUNTER-CLAIM

June 13, 1983

MR THOMPSON: ...But the problem that I have at this time is I do not have the file to proceed, and I am ill-equipped to proceed, and that's the reason that I would like the permission to file a written objection which I would include the fact that I feel that we are being deprived of certain constitutional rights in having to proceed with this particular trial. If the Court would so honor, I think if I raise a constitutional, it should be raised in writing and I apologize for not having it at this time, but I did not anticipate being here.

COURT:... I'm not going to continue this case any further. What I am going to do is, I'm going to give you until 9:30 tomorrow morning to locate Mr. Cohran and the file. Otherwise, we're going to select the jury at 9:30 in the morning and begin the trial in this case with or without Mr. Cohran or the file.

June 14, 1983.

MR THOMPSON: If I may, I have a couple of motions which I would like to present to the Court and objections to these proceedings...Your honor, I have filed with the Court a motion for a continuance for amendment of the pre-trial order to reinstate the answer and defensive pleadings of Mr. Cohran and to include the Counter-Claim. I've also filed a document-type objection to these proceedings...Mr. Cohran is unaware of the proceedings in this Court. Mrs. Cohran and I worked in my office until about 11:30 last night and then she stayed on until about 3 o'clock preparing for this particular trial....The objections that I have to these proceedings Your Honor, are based upon constitutional grounds and one in particular, Art. 1, Sec. 1, Para. 9 of the Georgia Constitution, provides, "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State in person by attorney or both", and I maintain, Your Honor,

that requiring us to go to trial when Mr. Cohran does not even know that this trial is scheduled when he left town at a time where there was a stay in effect amounts to a violation of this particular constitutional provision. We also have asserted that this violates his rights under the United States Constitution, various provisions, and other provisions of the Georgia Constitution, in that this proceeding in this manner would amount to depriving Mr. Cohran of a property right without due process of law and denying to him equal protection of the law and the other sections of the Georgia and United States Constitution as are set forth in my Motion for a Continuance. The objection which I have filed go basically to the fact that I entered this case several months ago. I have been familiar with the Appellate proceedings that have taken place and, in fact, have been the party that has drafted the Appellate proceedings and filed the Motions, made the arguments to this extent. I had planned to spend the weekend

becoming familiar with the evidence in this particular file and with the depositions that have been taken, in order that I may be able to determine the testimony of Mr. Carlin and Mrs. Carlin, whether I feel they are impeachable by virtue of deposition that have been taken. I have not had an opportunity to review these as I had planned, and it puts me in a position to where I do not feel I can give effective representation. I have great respect for the Court. I will proceed if the Court insist that I proceed, but only over the very strongest objections, and I feel that requiring me to proceed in this manner does deprive my client of his rights guaranteed by the Georgia and the United States Constitution.

COURT: ...I allowed you the opportunity to locate him yesterday before we begin the trial today. I can't see any further delay being necessary in this matter, so I'm going to go ahead and overrule your Motions and we'll proceed to trial in this case.

MR. JONES: Your Honor, we present before the jurors come in a Motion in Limine. Your Honor, is to instruct the defendants counsel and defendant should he appear during the trial to refrain from making argument or tending to introduce evidence or trying to introduce evidence tending to dispute any allegations contained in the complaint in view of the fact that the case is presently in default situation and all of the allegations set forth in plaintiff's complaint have been established as true and correct for all purposes of this proceeding. We think it would be improper to allow evidence and testimony intending to dispute those allegations when they've already been established. The second point is that we would like to request that they be prohibited from introducing any evidence or argument of any issues alleged in the defendant's counterclaim on the grounds that they are totally inconsistent with the established allegations of the plaintiff's complaint and if the plaintiff's

complaint is established to be true and correct, then as a matter of law and fact and logic, none of the allegations in the counterclaim could possibly be true and the defendant couldn't possibly be entitled to any of the relief he seeks in the counterclaim.

COURT: Well, I'll allow the Motion in Limine so far as the counterclaim is concerned....

MR. THOMPSON: ...I'd just like the course of the record to show that I take exception to the Court.

June 16, 1983.

MR. THOMPSON: ...I believe, Your Honor, that under the rules the closing argument may be split between two attorneys, and I would like to split our closing argument between myself and the defendant, Mr. Cohran.

COURT: No sir. I will not allow that.

MR. THOMPSON: I would like to renew my motion or the request I made that Mr. Cohran, the defendant, be allowed to participate in the closing arguments, and state that if he is not

allowed such that we consider it to be violations of his constitutional rights under both the Georgia and United States Constitutions.

COURT: Well, you might have a point in a criminal trial, however, I think in a civil trial where the lawyer is a defendant, I don't think there's any requirement that he be allowed to participate in the trial when he's represented by counsel. I'm not going to allow him to participate in the argument.

K-1

|Filed October 22, 1979|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN Plaintiffs vs. LARRY COHRAN, Defendant vs. TAYLOR W. Jones, et al., Third-Party Defendants	CIVIL ACTION NO. 793686 MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNT I OF PLAINTIFFS' COMPLAINT

Now comes Larry Cohran, defendant and third-party Plaintiff, in the above-styled case and moves the Court for a Judgment on the Pleadings as to Count I of plaintiffs' complaint on the grounds that said Count I shows on its face the plaintiffs are not entitled to the relief sought.

K-2

Wherefore, Larry Cohran prays for and demands that this Motion be inquired into and sustained and that Count I of plaintiffs' complaint be dismissed.

s/

LARRY COHRAN
Attorney for Defendant
and Third-Party
Plaintiff

L-1

|Filed October 22, 1979|
IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN Plaintiffs vs. LARRY COHRAN, Defendant vs. TAYLOR W. Jones, et al., Third-Party Defendants	CIVIL ACTION NO. 793686 MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNT II OF PLAINTIFFS' COMPLAINT

Now comes the defendant and third-party plaintiff, Larry Cohran, in the above-styled case and moves the Court for a Judgment on the Pleadings as to Count II of plaintiffs' complaint on the grounds that said Count II shows on its face that the plaintiffs are not entitled to the relief sought.

WHEREFORE, Larry Cohran prays for and demands that this Motion be inquired into and sustained and that Count II of plaintiffs' complaint be dismissed.

s/

LARRY COHRAN
Attorney for Defendant
and Third-Party
Plaintiff

M-1

|Filed May 8, 1981|
IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	
vs.	)	
TAYLOR W. Jones, et al.,	)	
Third-Party Defendants	)	

O R D E R

The Motion for Summary Judgment filed on October 22, 1979, as amended on July 18, 1981, which has converted to a Motion for Summary Judgment on May 5, 1980, by order of this Court, coming on regularly to be heard by this Court on the 4th day of May, 1981, and after hearing argument

of counsel, considering all papers heretofore filed so far as said Motion was concerned, together with the pleadings, the Motion is hereby overruled on each ground.

SO ORDERED, this 4th day of May, 1981.

s/

LAMAR KNIGHT,

Senior Judge

State of Georgia

N-1

|Filed May 8, 1981|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	
vs.	)	
TAYLOR W. Jones, et al.,	)	
Third-Party Defendants	)	

ORDER

The Motion to Dismiss, or in the alternate, Motion for Summary Judgment, filed by the Third Party Defendants on September 25, 1980, coming on regularly to be heard by this Court, and after hearing argument of counsel, after considering the pleadings and all papers filed in

connection with this Motion, IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the Motion to Dismiss be sustained on grounds one, two and three, and it is so ordered, this 4th day of May, 1981.

s/

LAMAR KNIGHT
Senior Judge
State of Georgia

O-1

|Filed May 8, 1981|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	
vs.	)	
TAYLOR W. Jones, et al.,	)	
Third-Party Defendants	)	

O R D E R

The Motion to Compel Discovery and Impose Sanctions filed on May 19, 1980, coming on regularly to be heard by this Court, and after hearing argument of counsel, IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the Defendant be and he is hereby directed to answer the following

questions as numbered in the Motion:

NUMBERS 1, 2, 8, 10 11, 11B, 12, 14, 15, 16, 16B, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30,31, 32, 33, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86 and 87. The Defendant is hereby Ordered and Directed to answer these questions on or before 9:00 o'clock A.M., May 10, 1981, and all other parts of the Motion are hereby overruled.

SO ORDERED, this 4th day of May, 1981.

s/

Lamar Knight
Senior Judge
State of Georgia

P-1

|Filed June 15, 1981|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 793686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	
vs.	)	
TAYLOR W. Jones, et al.,	)	
Third-Party Defendants	)	

MOTION TO COMPEL DISCOVERY

AND IMPOSE SANCTIONS

O R D E R

Motions of the Plaintiffs coming on regularly to be heard and after hearing arguments, IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that sanctions be granted.

It is further ordered and adjusted

that the Defendant has wilfully failed to comply with the Order of this Court dated May 4, 1981, and is hereby held to be in contempt of this Court. The Sheriff of this County is hereby ordered and directed to arrest this Defendant and to incarcerate him instanter until said Order is complied with.

It is further ordered that the Court will at a later date set a hearing for the hearing of the question of an amount of attorney's fees to be granted.

The defensive pleadings of the Defendant in this case are hereby stricken.

IT IS SO ORDERED, this 15th day of June, 1981.

s/

LAMAR KNIGHT
SENIOR JUDGE, STATE OF GEORGIA

Q-1

COURT OF APPEALS OF GEORGIA
Decided December 2, 1981

63158. COHRAN V. JONES, et al. 29-235

DEEN, Presiding Judge.

The order appealed from in this case is as follows: "The Motion to Dismiss, or in the alternative, Motion for Summary Judgment, filed by the Third Party Defendants on September 25, 1980, coming on regularly to be heard by this Court, and, after hearing argument of counsel, after considering the pleadings and all papers filed in connection with this Motion, IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the Motion to Dismiss be sustained on grounds one, two and three, and it is so ordered, this 4th day of May, 1981" Two motions to dismiss the appeal on the grounds that the case is still pending and the motion appealed from is not final have been made in this Court by the plaintiffs and by the third party defendants respectively.

The order appealed from granted the motion to dismiss the defendant's third party complaint

and two cross claims to the extent that the latter were directed against the third parties, which motion also "plead in the alternative that summary judgment be entered in favor" of the third parties. The named grounds were failure to state a claim upon which relief can be granted; improper venue in Cobb County, and failure to comply with Code Section 81A-114 in that these defendants "are not persons who are or may be liable to Cohran for all or part of the plaintiff's claims against him." Held:

1. It is clear that the order signed by the trial court on which this appeal is based is an appeal from a motion to dismiss the third parties (two Atlanta law firms) and not the grant of summary judgment in their favor. The court clearly ruled that the motion to dismiss was sustained. He also clearly stated the dismissal followed the consideration of argument of counsel, pleadings, and papers filed in connection with the motion. No evidence was considered. The grounds on which the motion was

based are not summary judgment issues. The first--that the pleadings set out no cause of action against the third party defendants--is in the nature of a general demurrer, which is a pleading matter. Venue and/or jurisdiction is a subject matter in abatement, not one involving a judgment on the merits. As to the third ground, it is clear from the pleadings that the defendant Cohran (an attorney who formerly represented the plaintiffs and who is being sued for malpractice) is not contending that the third party defendants (various attorneys or law firms who at various times have also represented the plaintiffs) have a liability over to him for any acts charged against him by the plaintiffs, but is instead tendering other defendants by means of allegations that any damages the plaintiffs have suffered is due to the negligence of other attorneys unconnected with him. Code Section 81A-114 dealing with third party complaints "does not allow the tender of another defendant who is or may be liable to the plain-

tiff." Balkcom v. Mull, 129 Ga. App. 277 (199 SE2d 346) (1973); Stein v. Burgamy, 150 Ga. App. 860 (2) (258 SE2d 684) (1979). See also Dorsey Heating & Air Conditioning Co. v. Dickson, Inc., 153 Ga. App. 599 (266 SE2d 282) (1980). From all of these facts it is clear that the order dismissing the third party defendants was in fact an order of dismissal and not the grant of a summary judgment, as contended by the appellant.

2. Having established that the order from which this appeal is made was not the grant of summary judgment, but a dismissal from this litigation of certain persons designated by appellant as third party defendants, we grant the motions to dismiss this appeal. The main case, together with the defendant's cross actions against the plaintiffs, is still pending in the trial court. There has been no grant by the trial judge of a 10-day certificate nor any petition for interlocutory review as required by Code Section 6-701 (2). We accordingly have no

jurisdiction. Lowe v. Payne, 130 Ga. App. 337 (203 SE2d 309) (1973).

Appeal dismissed. Banke and Carley, JJ., concur.

[Cited Cohran v. Jones, et al., 160 Ga. App. 761, (288 S. E. 2d 80) (1981)].

COURT OF APPEALS OF THE STATE OF GEORGIA
Atlanta, December 18, 1981

The Honorable court of Appeals met pursuant to adjournment. The following order was passed:

63158. Larry Cohran v. T. W. Jones et al

Upon consideration of the motion for rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia.

Clerk's Office, Atlanta December 18, 1981

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Alton Hawk, Clerk

R-1

COURT OF APPEALS OF GEORGIA

Decided December 2, 1981

63237. COHRAN v. CARLIN. 29-9

DEEN, Presiding Judge.

This contempt case arises from the litigation which was the subject of a notice of appeal in Cohran et al. v. Jones et al., Case No. 63158, this day decided. The notice of appeal in that action was filed May 8, 1981 and has been dismissed by this court as the litigation is still pending in the trial court, appellant having failed to obtain permission for an interlocutory appeal as required by Code Section 6-701(2). Two orders of the trial court passed the same day and requiring the defendant to answer certain interrogatories and make certain discovery were not complied with and this triggered the contempt judgment of June 15, 1981 from which this appeal was filed.

We affirm. Where, as in Walker v. Walker, 239 Ga. 175 (236SE2d 263) (1977) there is an appeal from a final judgment, such appeal de-

prives the trial court of jurisdiction to take further proceedings toward the enforcement of the judgment on appeal for the reason that Code Ann. Section 6-1002(a) provides that in civil cases a notice of appeal from such final judgment serves as a supersedeas. See also Lake v. Hamilton Bank of Dalton, 150 Ga. App. 123 (257 SE2d 31) (1979). Also, since the amendment to Code Section 6-701(2) by Ga. L.. 1975, pp. 757, 758, effective July 1, 1975, an order of the appellate court granting a petition for interlocutory review where the trial court has issued the required 10 day certificate that immediately review should be had, the notice of appeal timely filed thereafter "shall act as a supersedeas as provided in Section 6-1002 and the procedure thereafter shall be the same as in an appeal from a final judgment."

Turner v. Harper, 233 Ga. 482 (211 SE2d 742) was decided on January 7, 1975, prior to the effective date of Code 6-701(2) setting out the present procedure for interlocutory appeals.

That case properly held under the law then obtaining that were an interlocutory appeal is certified for review in the appellate court (no petition for review to this court being a part of the prior procedure), "[T]he trial court retains jurisdiction with discretionary power to proceed with the trial or enter any other order in the case pending the appeal." Id., p. 484. It is clear that except for the right to automatic supersedeas set out in Code Section 6-701(1) or (22) the trial court does in fact have jurisdiction to proceed with the case, although of course any judgment so rendered is subject to being vacated if adversely affected by the judgment in the pending appeal.

We have held in Cohran v. Jones, supra, that the attempted appeal in that case, not being from a final judgment nor upon the grant of a petition for interlocutory review, was a nullity. The trial court accordingly retained jurisdiction with discretionary power to order the defendant to comply with certain interro-

gatories, subpoenas and other discovery requests, and to hold him in contempt for wilful failure to do so.

Judgment affirmed. Banke and Carley, JJ., concur.

[Cited. Cohran v. Carlin, et al., 160 Ga. App. 762 (288 S.E.2d 81) (1981)].

COURT OF APPEALS OF GEORGIA

Atlanta, December 18, 1981

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

63237. Larry Cohran v. Stan Carlin, et al

Upon consideration of the motion for rehearing filed in this case, it is ordered that it be hereby denied.

Note: Additional pages written on motion for rehearing. Please add these attached pages to your original opinion dated December 2, 1981.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta December 18, 1981

I certify that the a above is a true extract

from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Alton Hawk, Clerk.

ON MOTION FOR REHEARING.

DEEN, Presiding Judge.

The appellant's motion misconstrues our citation of Turner v. Harper, 233 Ga. 482. We cited this case not as existing law but to support the proposition that supersedeas is a stay of proceedings in the trial court which can only come about legitimately when a statutory condition under which supersedeas is arrived at has been observed. Where there is no supersedeas pending appeal, the trial court has jurisdiction and may conduct further proceedings in the case.

We pointed out that the statutes provide two

cases in which the appeal acts as a supersedeas. This is because Code Section 6-1002 dealing with supersedeas in civil cases holds that in civil cases, "the notice of appeal filed as hereinbefore provided shall serve as a supersedeas, upon payment of all costs in the trial court by the appellant, and it shall not be necessary that a supersedeas bond be given..." (Emphasis supplied.)

Thus the filing of a notice of appeal "as hereinbefore provided" is a condition precedent to the grant of a supersedeas.

One of the two statutory methods of filing a notice of appeal so as to cause it to act as a supersedeas is that the notice of appeal be filed where the case is no longer pending in the trial court. Code Section 6-701(1). Cohran v. Jones, the main case and a companion case on this appeal is still pending and its notice of appeal was obviously not from a final judgment.

The other statutory method is when the notice of appeal is filed from an otherwise

unappealable order, after the trial court's certificate of review and this court's grant of an interlocutory appeal. See Code Section 6-701(2), which specifically specifies that such grant act as a supersedeas. Code Section 6-701(2)(B).

In no other case does the attempt to appeal a case by the filing of a notice of appeal act as a supersedeas. This contempt arose out of a failure to comply with an interlocutory order in the main case where an appeal of the main case was attempted. However, the attempted appeal was not from a final judgment and it was not one containing either a certificate of review or a grant from this court. Neither was it one of the specifically enumerated proceedings mentioned in the statute. Therefore, it was a mere nullity.

The appeal in Cohran v. Carlin, was from disobedience of an order in the main case not invoking supersedeas in either of the ways it may presently be invoked. Thus the question of

supersedeas had to be decided as though these statutes did not exist, since neither statutory method had been triggered. Turner simply stood for the proposition that where supersedeas is not involved, the trial court has a discretionary power to proceed with the trial (but at his peril, of course, if the case is reversed on appeal).

Here there was no valid notice of appeal in the main case and the appeal was dismissed. The trial court therefore was not subject to the restrictions of a supersedeas and he did have jurisdiction to compel obedience to a further interlocutory order in the main case.

None of the cases cited in the appellant's motion for rehearing indicates a different result, since in each of them there was in fact a valid appeal from a non-final judgment following a certificate of review by the trial court and the grant of an interlocutory appeal by this court, none of which appears in this record.

S-1

CLERK'S OFFICE, SUPREME COURT OF GEORGIA
Atlanta, February 10, 1982

Dear Sir:

Case No. 38386 COHRAN V. CARLIN et al, COHRAN V. JONES, et al.

The Supreme Court today granted writ of certiorari in this case. All the Justices concur.

This case will be assigned to the April 1982, oral argument calendar.

The Court is particularly concerned with the following:

The entire opinions of both cases.

Briefs filed in the Court of Appeals are included in the record presented to this court. Additional briefs are not required but may be submitted.

Very truly yours,

Mrs. Joline B. Williams, Clerk.

IN THE SUPREME COURT OF GEORGIA

Decided: May 25, 1982

38386. LARRY COHRAN V. STAN CARLIN et al.

HILL, Presiding Justice.

Stan and Margaret Carlin filed a complaint against their former attorney, Larry Cohran, alleging, inter alia, legal malpractice. Cohran answered and filed a counterclaim against the Carlins and a third party complaint against the Carlins' current attorneys, alleging that the Carlins and their attorneys have conspired to breach a contract between the Carlins and Cohran, and to harass Cohran.

The third party defendants filed a motion to dismiss or in the alternative for summary judgment. On the same day that the trial court granted this motion, the trial court entered two orders requiring the defendant Cohran to answer certain interrogatories and provide certain discovery, all of which related to the plaintiff's claim against the defendant Cohran. Meanwhile Cohran paid all costs and filed a

timely notice of appeal to the Court of Appeals from the order granting the third party defendants' motion to dismiss or in the alternative for summary judgment. When cohran failed to comply with the discovery orders, he was adjudged in contempt. Upon being adjudged in contempt he appealed that order, contending that the trial court had been deprived of jurisdiction over the case when he paid the costs and filed the notice of appeal from the order granting the third party defendants' motion.

In Cohran v. Jones, 160 Ga. App. 761 (SE2d) (1981), hereinafter identified as the "third party defendants' case", Cohran argued that the trial court had granted summary judgment to the third party defendants and thus had entered an order appealable by right. See Code Ann. 81A-156(h). The Court of Appeals held that the trial court had simply granted a motion to dismiss, and that such order was not final and thus was not appealable absent compliance with the procedures for interlocutory appeal. See Code

Ann. 6-701. The court therefore dismissed the appeal.

Simultaneously, in Cohran v. Carlin, 160 Ga. App. 762 (SE2d) (1981), hereinafter identified as the "contempt case", the Court of Appeals held that since the notice of appeal in the third party defendants' case was a nullity, the notice of appeal in that case did not effect a supersedeas. Thus the Court of Appeals concluded that the trial court had not lost jurisdiction and the contempt orders were valid.

We granted certiorari to consider both opinions of the Court of Appeals. Because of our resolution of the contempt case, Cohran v. Carlin, supra, 160 Ga. App. 762, however, we find it unnecessary to review the decision in the third party defendants' case, Cohran v. Jones, supra, 160 Ga. App. 761, and the writ of certiorari in that case is dismissed.

In the contempt case, Cohran contends that he could not be held in contempt for failure to comply with discovery orders relating to the

plaintiff's case against him when he had appealed the grant of a summary judgment in favor of the third party defendants. This argument is based upon the proposition that the civil actions (other than injunctions) the trial court loses jurisdiction upon the filing of a notice of appeal. See Georgia Practice and Procedure, 4th ed., Section 20-10 at p. 320 (1975). We granted certiorari to consider the application of this proposition to the factual situation presented by this case.

In Walker v. Walker, 25 Ga. 257, 260 (1958), the court entered an order which was promptly appealed. Because of the supersedeas effected by the appeal of the first order, the trial court later refused to rule on a motion to enter a second order. This court reversed, finding that the first order "was not a preliminary step to it [the second order] in any way, and was entirely independent of it."

Although Howard v. The Lowell Machine Co., 75 Ga. 325 (1885), was an equity case, its

reasoning is applicable here. There a restraining order was entered against multiple defendants. After hearing, the restraining order was rescinded as against one defendant and a temporary injunction was entered as to the other defendants. The plaintiff appealed the denial of injunctive relief as to the one defendant. Later the court dissolved the temporary injunction as to all defendants except one and the plaintiff again appealed, contending that the court had no power or authority to pass the second order. While recognizing that "The general rule is that, while a case is pending in this court on writ of error, further action by the court below in that case is coram non judice and void", the court held " that the filing of the [first] bill of exceptions did not remove the entire case to this court, so as to prevent further action by the chancellor as between the complainant and defendants who were not parties to the writ of error." 75 Ga. at 325. See also Massachusetts Bonding Co. v. Realty Trust

Co., 139 Ga. 180 (2) (77 SE 86) (1912).

In Bivins v. McDonald, 50 Ga. App. 299, 302 (177 SE2d 829) (1934), the court noted, "It is true that a trial judge loses jurisdiction of a case which has been taken to a court of review, whenever he signs the bill of exceptions, and as to all matters covered therein he is without further authority." (Emphasis supplied.) However, the court went on: "'Matters independent of and distinct from the questions involved in the appeal are not taken from the jurisdiction of the trial court.'" Id., quoting Elliott on Appellate Procedure, Section 545.

In Southeastern Wholesale Furn. Co. v. Atlanta &c. Co., 84 Ga. App. 271, 276 (66 SE2d 68) (1951), the court said: "Thus, while the trial judge, after certifying the bill of exceptions, loses jurisdiction of every issue presented therein, the case is still pending in the trial court, and he may conduct interlocutory matters, allow pleadings, and proceed with the trial of the case, subject to the peril

that any decision reached which conflicts with the decision of the appellate court when rendered will thereby be made nugatory."

In Young v. Reese, 119 Ga. App. 179 (1) (166 SE2d 420) (1969), the court held that it was not error for the trial court to try the case while the overruling of defendants' action to dismiss was on appeal.

In Turner v. Harper, 233 Ga. 483 (211 SE2d 742) (1975), the trial court overruled defendants' motion to dismiss the complaint and certified the order for interlocutory appeal, the defendants appealed the overruling of their motion to dismiss, the trial court later granted plaintiff's motion for summary judgment, and the defendants appealed the summary judgment arguing that the trial court was without authority to enter summary judgment while the case was on appeal. This court held that the trial court had jurisdiction to enter summary judgment pending the appeal. Although the court based its decision on the fact that the first appeal

was from an interlocutory order certified for appeal, the decision could have been based on the fact that the appeal was interlocutory.

Therefore, pursuant to Code Ann. Section 6-1002, a notice of appeal, with payment of cost, serves as a supersedeas of the judgment (unless supersedeas bond be required), and "while on appeal, the trial court is without authority to modify such judgment." Park v. Minton, 229 Ga. 765, 769 (194 SE2d 465) (1972); Walker v. Walker, 239 Ga. 175 (236 SE2d 263) (1977). But the notice of appeal supersedes only the judgment appealed; it does not deprive the trial court of jurisdiction as to other matters in the same case not affecting the judgment on appeal. Walker v. Walker, and Bivins v. McDonald, supra.

Assuming arguendo that the trial court's order was a grant of summary judgment in favor of the third party defendants (a matter which we do not decide) and that Cohran therefore had a right to appeal that order, Code Ann. Section 81A-156(h), we nonetheless hold that the trial

court retained jurisdiction of the main action (the Carlins' suit against Cohran) and could proceed to enter orders as necessary and appropriate in that matter; i.e., the trial court retained jurisdiction to compel discovery in the pending action and to adjudicate persons who violate its discovery orders to be in contempt.

This holding will allow discovery to continue as to matters pending in the trial courts notwithstanding the grant and appeal of summary judgments as to counterclaims, cross claims and third party compl[illegible]nts or the grant and appeal of partial summary judgments. If the trial judge's order is found to be correct on appeal, as it is in the clear majority of cases, the final trial and disposition of the litigation will have been expedited. See Young v. Reese, supra.

The trial court retained jurisdiction of the Carlins' suit against Cohran, and the discovery and contempt orders entered in that action were valid notwithstanding the appeal as to the third

party complaint. Therefore the judgment in Cohran v. Carlin, supra, 160 Ga. App. 762, is affirmed.

Writ of certiorari in Case No. 63158 dismissed; judgment in Case No. 63237 affirmed. All the Justices concur.

T-1

|Filed July 2, 1982|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	
vs.	)	
TAYLOR W. Jones, et al.,	)	
Third-Party Defendants	)	

O R D E R

The above-styled matter came on regularly to be heard by this Court.

IT IS ORDERED that the Sheriff of this County arrest the Defendant, LARRY COHRAN, as soon as he is released from the

hospital, and incarcerate him in the jails of this County until he complies with the order of May 4, 1981, in connection with answering all the questions and complying with the Order of that same date, so far as the furnishing of documents is concerned.

ISSUED this 2nd day of July 1982.

s/

LAMAR KNIGHT
Senior Judge
Georgia Superior Courts

U-1

|Filed July 13, 1982|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	

MOTION FOR DISCHARGE OF CONTEMPT

Comes now the defendant LARRY COHRAN and moves the court for a discharge of contempt and for cause shows the court the following:

1.

On May 4, 1981, the court issued an order directing the defendant to answer certain questions posed to him in a discovery deposition. Said order of May 4, 1981 is attached hereto as Exhibit "A".

2.

On June 15, 1981, the court held the defendant in contempt of court and imposed sanctions for the failure of the defendant to comply with the order of the court dated May 4, 1981. A copy of said order is attached hereto as Exhibit "B".

3.

On June 15, 1981, the defendant filed a notice of appeal from the dismissal by the court of the third party complaint and therefore in good faith believed that the case was stayed and that defendant was not required to answer the questions as ordered by the court on May 4, 1981.

4.

Subsequently, the Court of Appeals and the Supreme Court affirmed the June 16, 1981, order of the trial court. See Cochran v. Carlin, 160 Ga. App. 762 (1982); Cochran v. Carlin, Case No. 38386

decided May 25, 1982 by the Supreme Court of Georgia, Hill, J.

5.

On July 8, 1982, defendant submitted himself to a continuance of the deposition as ordered by the court on May 4, 1981. The defendant answered the required questions in substantially the form shown on Exhibit "C" attached hereto and incorporated by reference herein.

6.

The defendant has further produced all documents or offered to deliver said items as required by the court order of May 8, 1981.

7.

The defendant is presently incarcerated pursuant to an order of the court dated July 2, 1982 in the common jail of Cobb County, said order being attached hereto as Exhibit "D".

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8.

The defendant has answered all enumerated questions of the deposition except 15 questions in which defendant invoked the protection of the Fifth Amendment to the Constitution of the United States (Ga. Code Ann. §1-805) and Article 1, Section I, Par. XIII of the Constitution of the State of Georgia (Ga. Code Ann. §2-113) in that the answer in that the answering of said questions would incriminate the defendant and could be used in a prosecution against him in a criminal proceeding.

9.

Defendant is not in willful contempt of the order of May 15, 1981, in that he was given no opportunity to further answer questions on oral deposition as required by the court pursuant to its order of May 4, 1981.

WHEREFORE, the defendant prays:

(a) That he be discharged from contempt; or

(b) In the alternative, should the court fail to discharge him from contempt, that he be released on supersedeas; and

(c) That defendant have any and all other relief the court may deem just and proper in the premises.

By: s/
ROY E. BARNES
Attorney for Defendant

√-1

|Filed July 13, 1982|
IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	

ORDER

Motion for discharge of Contempt having been presented and both counsel being present,

IT IS HEREBY ORDERED that the said Motion is Denied.

This 13th day of July, 1982.

s/
LAMAR KNIGHT, JUDGE
SUPERIOR COURTS,
SENIOR JUDGE

W-1

|Filed November 2, 1982|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN Plaintiffs vs. LARRY COHRAN, Defendant	)	CIVIL ACTION NO. 79-3686

MOTION TO SET ASIDE AND VACATE ORDERS OF JUDGE LAMAR KNIGHT

Now Comes LARRY COHRAN Defendant in the above-styled matter and moves the court to set aside and vacate Orders, Judgments and Actions of record in this case signed and entered by Lamar Knight, Senior Judge of the State of Georgia. In support of the Motion Defendant relies upon the record of the case, constitutional, statutory and case law and states there is a non-amendable defect on the face of the record filed in this case.

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Dated this 5th day of November, 1982.

FLETCHER THOMPSON
Attorney for Defendant

COURT OF APPEALS OF GEORGIA
Atlanta, November 3, 1982

65080. COHRAN v. CARLIN et al.

CARLEY, Judge.

The instant appeals has a rather complicated history, a summary of which is necessary to the resolution of the issue presented.

Appellee--plaintiffs, the Carlins, instituted suit against appellant--defendant, Cohran, a practicing attorney. Subsequently, the Carlins sought to depose Cohran in connection with their pending action. During the deposition, [Cohran] refused to answer some 91 questions, premising his objections on various grounds, including irrelevancy, immateriality, and an assertion that the answering would work a forfeiture of his estate or tend to bring infamy or disgrace or public contempt upon himself or any member of his family. Apparently, however, Cohran did not at this time specifically assert a Fifth Amendment privilege and object on the basis that answering would tend to incriminate him. The Carlins made a motion to compel dis-

covery and the trial court, after conducting a hearing ordered Cohran to respond to some 71 of the 91 unanswered questions. At this hearing on the motion to compel, Cohran did assert that his objection during the deposition to several of the Carlins' questions, no one of which is at issue in the instant appeal, was "the equivalent of the Fifth Amendment" and that the evidence sought thereunder "might tend to incriminate" him.

When Cohran subsequently failed to comply with the trial court's order requiring that he answer the 71 questions, he was adjudged in contempt. Cohran then appealed from the contempt order. This contempt order was affirmed in Cohran v. Carlin, 160 Ga. App. 762 (288 SE2d 810 (1981). The affirmance by this court of the contempt order was itself upheld by the Supreme Court on certiorari in Cohran v. Carlin, 249 Ga. 510 (SE2d) (1982).

When remittitur affirming the contempt order was returned to the trial court, Cohran's depo-

sition was rescheduled in order that he could answer the 71 previously unaddressed questions and thus purge himself of contempt. During the rescheduled deposition, Cohran for the first time invoked his Fifth Amendment privilege against self-incrimination and, on this basis refused to answer some 15 or 16 of the original 71 questions the trial court had previously ordered him to answer. No such privilege or objection to these specific questions had ever previously been invoked or raised during either the original deposition or the original hearing on the motion to compel. After Cohran had been redeposed, he moved for an order discharging his contempt for having failed to obey the trial court's original directive to answer the 71 questions. The trial court denied cohran's motion for discharge and it is from this order that Cohran brings the instant appeal.

It is essentially Cohran's position that, on the above stated facts, he did not waive his Fifth Amendment privilege against self-incrimi-

nation as to any of the original 71 unanswered questions and that his subsequent invocation of that privilege as to several of the questions at the rescheduled deposition was therefore not in continuing contempt of the trial court's order requiring that he respond to the questions. Accordingly, the issue presented for resolution in the instant appeal may be stated as follows: Where a witness in a civil action fails to invoke his Fifth Amendment privilege when. the question is originally asked, relying solely on other objections and privileges in refusing to answer, and the trial court orders that the questions be answered over the stated objections, can the witness, subsequent to an an affirmance of the trial court's order by the appellate courts, avoid being cited for contempt by then asserting a self-incrimination privilege as the basis for his refusal to respond to the question?

"'The protections of the Fifth Amendment may be invoked in civil as well as criminal actions,

[cits.], and apply fully to state proceedings through the Fourteenth Amendment. [Cit.]" Tennesco v. Burger, 144 Ga. App. 45, 47 (240 SE2d 586) (1977). However, "there '...is no blanket Fifth Amendment right to refuse to answer questions in non-criminal proceedings"...The privilege must be specifically claimed on a particular question and the matter submitted to the court for its determination as to the validity of the claim,'"..." Tennesco, 144 Ga. App. at 48, supra. "Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege." Garner v. U. S., 424 U.S. 648, 655 (47 LEd2d 370, 96 SCt 1178) (1976).

At the original deposition, Cohran invoked no specific claim of his Fifth Amendment privilege as to the relevant questions at issue in the instant appeal. "[T]he claim of privilege should be made when the question is asked...[i]t

cannot operate as a general prohibition of inquiry..." Chastain v. State, 113 Ga. App. 601, 602 (149 SE2d 195) (1966). That Cohran was not unaware of his rights under the Fifth Amendment is established by the fact that he argued the privilege against self-incrimination as to some of the other questions during the original hearing before the trial court on the motion to compel.

During the original deposition and hearing on the motion to compel, Cohran asserted various other privileges and objections to answering the questions. None of the objections which Cohran originally raised addressed the fundamental underlying authority of the Carlins to obtain discovery. In other words, none of Cohran's original objections, if sustained by the trial court or on appeal, would have resulted in a holding that the Carlins had no right, generally, to depose him in the pending litigation. Compare Murphy v. Waterfront Commission of New York, 378 U. S. 52 (12 LEd2d 678, 84 SCt

1594) (1964) (holding that one who relied, in refusing to answer questions, on the supposed lack of authority of the agency involved to deal with the subject matter, was not, under the circumstances, precluded from invoking his Fifty Amendment privilege after his jurisdictional objection proved unsuccessful). Under these circumstances, Cohran's original failure to specifically raise the Fifth Amendment privilege against self-incrimination as to the relevant questions in the instant appeal cannot be view as a "silent" invocation of the privilege. "[T]he witness may not stand [mute], but must testify that the answer would criminate or tend to criminate himself, work a forfeiture of his estate, or tend to bring infamy or disgrace or public contempt upon himself or any member of his family as the case may be, otherwise he would be in contempt. [Cits.]" Wynne v. State, 139 Ga. App. 355, 357 (228 SE22d 378) (1976). Compare Bishop v. Bishop, 157 Ga. 408 (121 SE 305) (1923).

It appears that if Cohran, having failed to raise his Fifth Amendment privilege in the trial court, had asserted that privilege for the first time in the appellate courts on the prior appeal of the order citing him for contempt, that assertion of the privilege would have been untimely and unavailing. "Throughout the proceedings before the [trial court, Cohran] did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought. It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him, [cit.], a determination which it cannot make if not advised of the contention. [Cits] The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it. [Cits.]" (Emphasis supplied) Vajtauer v.

Comm'r of Immigration, 273 U. S. 103, 113 (47 SCt 302, 71 LEd 560) (1929). See also Garland v. State of Ga., 101 Ga. App. 395, 400 (2) (114 SE2d 176) (1960).

It is true that, in this case, Cohran eventually "raised" his Fifth Amendment privilege in the trial court. However, that the privilege was first raised only in the context of proceedings occurring subsequent to the affirmance by both appellate courts of the trial court's original contempt order which directed Cohran to answer the enumerated questions over the stated objections. "After a remedial proceeding for contempt has been reviewed and affirmed by the supreme court, as to the imprisonment ordered, and as to the terms prescribed in the order for avoiding imprisonment, the terms will not, before the imprisonment has commenced, be changed because the party is unable to comply, unless he has become unable since the order was passed. Defenses or excuses which were, or might have been, presented before, are

res adjudicata." (Emphasis supplied) Thweatt v. Kiddo, 58 Ga. 300 (1) (1877). See also Ryan v. Kingsbery, 89 Ga. 228 (1) (15 SE 302) (1892). Accordingly, we hold that, under the limited and unique circumstances which existed in the case at bar, the trial court was clearly authorized to conclude that Cohran's post-appeal assertion of the Fifth Amendment "privilege against self-incrimination was pure afterthought," (Robers v. U. S., 340 U.S. 367, 371 (95 LEd 344, 71 SCt 438) (1951)), and that he waived the privilege by failing to invoke it in a timely and proper fashion at the "first opportunity". See generally Cohran v. Sosebee, 120 Ga. App. 115, 121 (169 SE2d 624) (1969). The trial court did not err in refusing to discharge Cohran from contempt. See generally Wood v. Wood, 240 Ga. 861 (242 SE2d 599) (1978).

Judgment affirmed. Quillian, C. J., and Shulman, P. J., concur.

[Cited: Cohran v. Carlin, et al., 297 S.E.2d 54, (Ga. App.) (1983)].

COURT OF APPEALS OF THE STATE OF GEORGIA
Atlanta, January 17, 1983

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

65080 Larry Cohran v. Stan Carlin et al

Upon consideration of the motion for a rehearing filed in this case, is is ordered that it be hereby denied.

NOTE: Three new pages were written on motion for rehearing. Please put new attached pages on the back of your old opinion dated November 3, 1983.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta January 17, 1983

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Alton Hawk, Clerk.

65080. COHRAN V. CARLIN et al.

ON MOTION FOR REHEARING

In his motion for rehearing, appellant asserts that our holding is in conflict with Georgia Railroad Co.v. Lybrend, 99 Ga. 421 (27 SE 794)(1896). "The fact that Lybrend had made the waiver at a former hearing before a different jury, and under circumstances necessarily to a greater or less extend unlike those surrounding the last trial, did not preclude him from exercising his privilege at a later stage of the case...Considered merely as any other witness, Lybrend therefore had a right to claim his privilege at the last trial, notwithstanding the fact that at a previous hearing of the case he may have voluntarily waived it." Lybrend, 99 Ga. at 439-441, supra. See also Mallin v. Mallin, 227 Ga. 833, 836 (3) (183 SE2d 377) (1971).

Unlike the Lybrend and Mallin decisions, the issue of waiver in the instant case is presented by Cohran's total failure to assert the

privilege in a timely and appropriate fashion, by invoking it in the trial court during the course of the original and only proceedings which have been held to determine whether Cohran's answers were compellable. Vajtauer, 273 U. S. 103, supra. In Lybrend and Mallin the witness originally waived his privilege and testified freely as to certain matters at a former trial but, at the subsequent de novo proceeding, invoked his privilege as to those matters. On these facts, it was held that the witness' original testimony as to the incriminating matters was not an irrevocable waiver of the privilege and that he could "subsequently, at a second and entirely different trial, [claim] his privilege of giving no testimony whatever in regard thereto...A party often waives at one trial what he has an undoubted right to object to at a subsequent hearing of the same case." Lybrend, 99 Ga. at 441, supra. In short, Lybrend and Mallin "simply [hold] that a party who [waives the

privilege] at one trial may claim the privilege against self incrimination at a later trial." Feig v. Feig, 246 Ga. 763, 764 (272 SE2d 723)(1980).

In direct contrast, Cohran's actions with regard to the privilege--his original failure to assert it and his subsequent belated invocation of it in defense of his refusal to testify--occurred in the context of continuing proceedings in the same case, not de novo and separate trials. The issue is and always has been whether, to avoid being held in contempt, Cohran should answer certain questions in connection with pre-trial discovery in appellants' only suit. However, after Cohran, 249 Ga.. 510, supra, the rescheduling of Cohran's deposition in order that he purge himself of his original contempt was not a totally de novo hearing on the issue of whether Cohran should be compelled to answer the previously unaddressed questions. At that point, the trial court, this court and the

Supreme Court had already held that Cohran should be compelled to answer the questions over all of the objections previously urged and that his refusal to do so was contempt. Where Cohran was aware of his privilege and could have asserted it before the trial court in defense of his original refusal to answer the questions, Cohran's post-appeal invocation of the privilege is ineffective to purge his contempt. Thweatt, 58 Ga. 300, supra. See also Ryan, 89 Ga. 228, supra; Kingsbery, 92 Ga. 108, supra.

Our judgment affirming the trial court's refusal to discharge Cohran for contempt is adhered to.

Motion for rehearing denied.

Clerk's Office Supreme Court of Georgia
Atlanta, February 12, 1983

Dear Sir:

Case No. 39645. Cohran v. Carlin et al.

The Supreme Court today denied the writ of certiorari in this case. All the justices concur, except Smith, J., dissents.

Very truly yours,

Mrs. Joline B. Williams, Clerk.

Clerk's Office, Supreme court of Georgia
Atlanta, March 9, 1983

The motion for reconsideration was denied today:

Case No. 39645, Cohran v. Carlin, et al.

Smith, J., dissent.

Yours very truly,

Mrs. Joline B. Williams, Clerk.

Z-1

|Filed May 9, 1983|
IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	
vs.	)	
TAYLOR W. Jones, et al.,	)	
Third-Party Defendants	)	

ORDER

WHEREAS, the following appears from the record of the above-styled case:

1.

On May 4, 1981, this court entered an Order compelling the Defendant herein, LARRY COHRAN, to respond to certain specified questions at oral

deposition and to produce certain specified documents.

2.

On June 15, 1981, this court entered an Order finding Defendant Larry Cohran in willful contempt of court for failure to comply with the Order of May 4, 1981, and ordered his immediate arrest and incarceration in the jail of this county until such time as he complied with said Order.

3.

This court's Order of June 15, 1981, was affirmed by the Court of Appeals of the State of Georgia (Cohran vs. Carlin, et al., 160 Ga. App. 762), and the Supreme Court of the State of Georgia (Cohran vs. Carlin, et al.,m 249 Ga. 510).

4.

On July 9, 1982, following receipt of the remittitur from the Court

of Appeals, this court again entered an Order requiring the sheriff of this county to arrest Defendant Cohran and incarcerate him in the jail of this county until such time as he complied with the discovery order of May 4, 1981.

5.

On November 3, 1982, the Court of Appeals of Georgia issued its judgment (Cohran vs. Carlin, et al., Case Number 65080) affirming this court's order of July 9, 1982. The Court of Appeals of Georgia denied Defendant's Motion for Rehearing, and the Supreme Court of Georgia has denied Defendant's Petition for a Writ of Certiorari and the reimittitur of the Court of Appeals has been received in this court.

6.

On March 17, 1983, Defendant filed a petition in the United States

District Court for the Northern District of Georgia, Atlanta Division, in which he sought removal of this action from this court to the United States District Court, as well as injunctive and other relief.

7.

On April 11, 1983, The Honorable G. Ernest Tidwell, Judge, United States District Court, entered an Order overruling and denying Defendant's petition and remanded this action to this court. Said Order was filed with the Clerk of the United States District Court for the Northern District of Georgia, Atlanta Division, on April 12, 1983.

IT FURTHER APPEARS that Defendant Cohran has not answered all of the questions as required by this court's Order of May 4, 1981.

IT IS, THEREFORE, ORDERED that the sheriff of this county arrest the

Defendant, Larry Cohran, and incarcerate him in the jail of this county until such time as the Defendant complies with this court's discovery order of May 4, 1981, by providing full and complete answers to the questions referred to in said Order.

IT IS FURTHER ORDERED that should Defendant desire to purge himself of contempt, he must notify Plaintiffs' attorney, TAYLOR W. JONES, of his intention to provide full and complete answers to the questions as required by this court's Order of May 4, 1981.

IT IS FURTHER ORDERED that Taylor W. Jones, upon notification of Defendant's intent to completely and fully answer the questions as required by this court's Order of May 4, 1981, make all necessary arrangements, including the services of a certified court reporter, to take the deposition of the Defendant in

the jail of this county as soon as reasonably practical.

At such time as the Defendant deems he has fully and completely answered the questions as required by the Order of May 4, 1981, Defendant may move for an order purging himself of contempt. This court will not consider such motion until Plaintiffs have been provided an opportunity to respond.

The court continues to reserve ruling on the amount of attorneys' fees to be awarded Plaintiffs' attorneys in connection with Defendant's failures to comply with discovery requirements and the motions filed by Plaintiffs in connection therewith.

SO ORDERED, this 9th day of May, 1983.

s/ARTHUR W. FUDGER
Judge, Superior Court,
Tallapoosa Judicial Circuit
Presiding as Judge, Cobb
Judicial Circuit

AA-1

|Filed June 8, 1983|

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	
vs.	)	CIVIL ACTION NO. 793686
LARRY COHRAN,	)	
Defendant.	)	

O R D E R

Defendant's Motion for Judgment on the pleadings having in effect been overruled and superseded by the pre-trial order the same is hereby, once again, overruled and the court declines to grant a certificate of immediate review.

SO ORDERED, this 6th day of June, 1983.

s/ARTHUR W. FUDGER
JUDGE TALLAPOOSA JUDICIAL CIRCUIT
PRESIDING AS JUDGE COBB JUDICIAL CIRCUIT

BB-1

|Filed November 15, 1982|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 793686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	
vs.	)	
TAYLOR W. Jones, et al.,	)	
Third-Party Defendants	)	

PRE-TRIAL ORDER

[Pertinent portion set forth hereafter]

2. STATEMENT OF THE CASE

Plaintiffs and Defendant entered into a relationship of attorney and client and during said relationship Plaintiffs transferred approximately Thirty-Six Thousand Dollars in cash, three parcels of

real estate, and several fire arms. Upon termination of the attorney-client relationship Defendant has refused to reconvey said property to the Plaintiffs and they are asking for recovery of said property and damages. Plaintiffs further allege that the services rendered by Defendant constituted legal malpractice causing Plaintiffs additional damages,. that Defendant acted in bad faith and has been stubbornly litigious entitling Plaintiffs to an award of reasonable attorneys' fees and that as a result of fraud perpetrated on the Plaintiffs by the Defendant they are entitled to an award of punitive damages to deter the Defendant from such conduct in the future.

This case is now in default and the only issue to be considered is that of damages. Defendant alleges that expenditures made by him and services

rendered to Plaintiffs far exceed any money or property he received from the Plaintiffs and Plaintiffs are not entitled to damages. Defendant also denies that Plaintiffs are entitled to an award of attorney's fees or punitive damages.

3. UNCONTROVERTED FACTS AND ISSUES OF LAW

As this case is in default and liability has been fixed Defendant will not be allowed to comment on or introduce evidence regarding equitable principles such as the "clean hands" doctrine insofar as such principles apply to original transactions between the parties. Equitable principles shall be confined solely to the balancing of equities in off setting services rendered with malpractice and elements of fraud in determining attorneys' fees and punitive damages.

6. AMENDMENTS TO PLEADINGS

No further amendments to the pleadings will be allowed and as the defensive pleadings have been stricken along with the Third-Party Complaint this matter will precede to trail as a default case.

11. MODIFICATIONS AND INTERPRETATION

This pre-trial order has been formulated after conference at which counsel for the respective parties have appeared. Reasonable opportunity has been afforded counsel for additions and deletions. Hereafter, this order will control the course of the trial and may not be amended except by consent of the parties and the Court or by Order of the Court to prevent manifest injustice. The pleadings are hereby deemed to be merged and this pre-trial order will supersede the pleadings.

SO ORDERED, this 12th day

BB-5

of November, 1982.

ARTHUR W. FUDGER
JUDGE, SUPERIOR COURT
TALLAPOOSA JUDICIAL
CIRCUIT
PRESIDING AS JUDGE COBB
SUPERIOR COURT

CC-1

|Filed November 15, 1982|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 793686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	
vs.	)	
TAYLOR W. Jones, et al.,	)	
Third-Party Defendants	)	

OBJECTIONS TO PRETRIAL ORDER AND REQUEST TO AMEND

Now Comes LARRY COHRAN, Defendant and objects to the Court's Pre-trial Order and moves the Court to amend its Pre-Trial Order as is indicated below and in support of the Motion states that the Pre-trial does not:

1.

Take into consideration that Defendant has a Motion which has not been disposed of to dismiss Plaintiffs' Complaint based upon the fact that the Complaint shows on its face that the recovery Plaintiffs seek grow out of a contract contrary to the public policy of the State of Georgia and is barred by law and equity from consideration by the Court as a matter of Law.

2.

Take into consideration Defendant's counterclaim for monies due upon the employment contract.

3.

Provide a form of jury verdict whereby Defendant can effect recovery should the jury find monies owing to

Defendant are greater than that owing to Plaintiffs.

4.

Provide a form of verdict for nominal damages.

5.

Have a provision for reasonable attorney's fees on the counterclaim or provide a form of verdict for reasonable attorney's fees on the counterclaim.

6

Have a provision for punitive damages on the counterclaim or provide a form of verdict for punitive damages on the counterclaim.

Further, the Statement of the case and Uncontroverted Facts and Issues of Law should be amended to state Plaintiffs have

ratified the employment contract and that the employment contract is binding upon all parties.

Defendant request that he be allowed to put into evidence as an Exhibit Defendant's Counterclaim and Amendment thereto.

Defendant request that Section 6, Amendments to Pleadings, provide that Defendant's defensive pleadings and the Third Party Complaint were stricken and the case should go to the jury on Plaintiffs' Complaint and Defendant's Counterclaim and Amendment thereto.

Defendant request that he be allowed further discovery in relation to the damages of the Plaintiffs.

Defendant shows the Court that the Pre-Trial conference was held on Friday, November 5, 1982, and he had less than twenty-four (24) hours earlier employed

lead counsel Fletcher Thompson. Due to the complexities of the case, Fletcher Thompson does not consider the time that has lapsed since the Pre-Trial as adequate time to study the law and the case and therefore respectfully submits that the amendments as above stated be allowed.

Dated this 15th day of November, 1982.

s/

FLETCHER THOMPSON

Attorney for Defendant

DD-1

|Filed December 20, 1982|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	

ADDITIONAL OBJECTIONS TO PRE-TRIAL ORDER

Now Comes LARRY COHRAN, Defendant in the above-styled matter and files further the objections to the Pre-trial Order of the Court entered on November 15, 1982:

1.

Defendant objects to a Pre-trial Order which does not incorporate in its entirety the Complaint and the Couterclaim as amended. Because of the unique

characteristics of the Complaint and the Counterclaim, Defendant does not believe that the contentions of the parties may be accurately set out in a condensed fashion by a statement of the case in the Pre-trial Order but that the Complaint and Counterclaim as amended must be the contentions and such must be incorporated into the Pre-trial Order as a part of the Pre-trial Order and not superceded by the contentions of the parties as expressed in the Pre-trial Order.

2.

Defendant objects to the Section 3 Uncontraverted Facts and Issues of Law and particularly the statement that Defendant may not comment on or introduce evidence regarding the equitable principles such as the clean hands doctrine. Even a Complaint in default must state a cause of

action if recovery is to be made which is especially true with equitable petitions and further, one can always avail himself of the law of the State of Georgia even though he is in default. To deny Defendant the right to assert the law of Georgia as it relates to the clean hand doctrine violates Defendant's rights under the Fourteenth Amendment of the United States Constitution. Also the prohibition against commenting or introducing evidence related to the clean hands doctrine could be read to preclude the introduction of the original Complaint or the reading of the original Complaint. Defendant feels very strongly that he has a right to insist that Plaintiffs show what fiduciary duty was breached. The only fiduciary duty alleged was to help Plaintiff hide money and property from Plaintiffs' creditors and this involves the clean hand

doctrine.

3.

Defendant objects to the Pre-trial Order ending discovery as to the amounts of damages and the basis of the damages.

4.

Defendant objects to any form of verdict which allows Plaintiff any form of damages or attorney's fees or requires the reconveyance of any property.

Dated this 16th day of December, 1982.

Respectfully submitted,

FLETCHER THOMPSON
Attorney for Defendant

EE-1

|Filed June 14, 1983|
IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	

MOTION FOR CONTINUANCE
AND
AMENDMENT OF PRE-TRIAL ORDER TO REINSTATE ANSWER, DEFENSIVE PLEADINGS AND INCLUDE COUNTER-CLAIM

Defendant LARRY COHRAN has had his defensive pleadings stricken by JUDGE LAMAR KNIGHT based upon Cohran's failure to comply with an order requiring answers to certain questions he had refused to answer on a deposition.

Attorney for Stan and Margaret Carlin contends that the Counter-Claim is in the nature of defensive pleadings and is also

stricken. Cohran contends his Counter-Claim has not been stricken and he should be allowed to present evidence on the Counter-Claim at trial. The Pre-trial Order entered in this case ignores the Counter-Claim and written objections have been filed by Cohran's attorney.

The Pre-trial Order is also predicated upon Cohran's Answer and defenses having been stricken. Cohran has since been punished by being jailed and incarcerated for fifteen (15) days for having failed to answer and has now answered the questions. The failure to allow Cohran to defend the action after having been punished by imprisonment amounts to double punishment prohibited by the laws and Constitution of the United States and the State of Georgia. (Art. I, Sec. I, Par. I, Georgia Constitution; Art. I, Sec. I, Par. IX, Georgia Constitution;

Art. I, Sec. I, Par. XV, Georgia Constitution; Fifth Amendment, U. S. Constitution; Fourteenth Amendment, U. S. Constitution; Am. VII, U. S. Constitution; Am. VIII, U. S. Constitution; Article I, Sec. I, Par. XIV, Georgia Constitution; Art. I, Sec. II, Par. III, Georgia Constitution).

Article I, Section I, Paragraph I of the Georgia Constitution provides:

> "No person shall be deprived of life, liberty, or property, except by due process of law."

Article I, Section I, Paragraph IX of the Georgia Constitution provides:

> "No person shall be deprived of the right to prosecute or defend his own

cause in any of the courts of this State, in person, by attorney, or both." (Emphasis supplied).

Article I, Section I, Paragraph XV, of the Georgia Constitution provides in pertinent part:

"No person shall be put in jeopardy of life or liberty more than once for the same offense,..."

Fifth Amendment, U. S. Constitution provides in pertinent part as follows:

"No person shall...be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property

without due process of law; ..."

Fourteenth Amendment, U. S. Constitution provides as follows:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Seventh Amendment, U. S. Constitution provides as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by

jury shall be preserved, ..."

Eighth Amendment, U. S. Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Article I, Section I, Paragraph XIV, of the Georgia Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted, ..."

Article I, Section II, Paragraph III, of the Georgia Constitution provides as

follows:

> "Protection to person and property is the paramount duty of government and shall be impartial and complete."

Cohran had a property interest in his answer, defensive pleadings, and his Counter-Claim. For the Court to refuse Cohran's right to assert these at the trial denies to Cohran due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution and the Constitution and Statutes of the State of Georgia. Further, the punishment inflicted upon Cohran as sanctions in the contempt matter are excessive, cruel and unusual under the circumstances in that Cohran relied in good faith on the proposition that the filing of his Notice

of Appeal and paying all costs on the case would act as a supersedeas and that until the Court of Appeals had an opportunity to address his Enumeration of Error as to the trial court's requiring him to answer said questions on deposition over his stated objections that he would not be required to answer same until remittitur back to the trial court.

Larry Cohran respectfully moves that the Pre-trial Order be amended so as to reinstate his defensive pleadings and provide for the Counter-Claim and that a (4) week continuance be granted to allow Cohran time to prepare his defenses and Counter-Claim and to subpoena witnesses needed to present those matters.

Dated this 14th day of June, 1983.

FLETCHER THOMPSON
Attorney for Defendant

FF-1

|Filed June 14, 1983|

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STAN CARLIN and MARGARET A. CARLIN	)	
Plaintiffs	)	CIVIL ACTION NO. 79-3686
vs.	)	
LARRY COHRAN,	)	
Defendant	)	

OBJECTIONS

Now Comes Defendant LARRY COHRAN by and through his attorney and objects to proceeding to trial under the conditions set forth by the Pre-Trial Order and at the time as instructed by the Court which is to be 9:30 A.M. on June 14, 1983.

Defendant through his attorney asserts that his rights under the United States Constitution and Constitution of Georgia are being violated by virtue of his attorney being forced to trial under

threat that if Defendant does not appear, the trial will take place in any event, even if Defendant's attorney is unable to contact Defendant.

Background Statement

On Friday, June 10, 1983, upon returning to his office, Defendant's Attorney Fletcher Thompson was told by Defendant LARRY COHRAN that the Georgia Court of Appeals had granted a stay of the proceedings in the Cobb Superior Court and that he was going to leave town for five or six days just as soon as he picked up a written copy of the Order from the Georgia Court of Appeals.

After that point in time Defendant's attorney did not see or meet with Defendant.

After Defendant had left Defendant's attorney's office, Defendant's attorney talked to the attorney for STAN CARLIN,

Taylor Jones, and was advised that a copy of the Motion for Stay had been received in his office that morning and he had been appraised it had been granted. He said he was preparing a Motion to Vacate and would be at the Court of Appeals Monday morning. Defendant's attorney discussed this with Defendant's wife and in conjunction with Defendant's wife prepared objections to the Motion to Vacate which Defendant's attorney put in final order the first thing Monday morning and which was hand delivered to the Georgia Court of Appeals. Defendant's attorney was told by the Deputy Clerk that there could be no oral arguments and he should not talk with a Judge.

At approximately 1:30 P.M. on Monday, June 13, 1983, Defendant's attorney received a call from Taylor Jones, Plaintiff's Attorney, and was told that

the stay had been vacated and he was with Judge Arthur Fudger at the Cobb County Courthouse ready to proceed with the trial. Defendant's attorney then talked to Judge Fudger, explained the situation to Judge Fudger including the fact that Defendant's attorney did not have any of the files and Judge Fudger advised Defendant's attorney that he would proceed to strike a jury at 2:00 P.M. even though Defendant may be totally unrepresented by counsel.

Defendant's counsel, over the next few minutes, made several calls trying to determine the whereabouts of Defendant but was unsuccessful and then proceeded to court where he arrived at approximately 2:10 P.M.

Shortly thereafter Plaintiff's counsel and Defendant's counsel made statements for the record and Judge Fudger

stated that he would proceed with the striking of the jury at 9:30 A.M. on June 14, 1983, whether the Defendant was present or not.

Defendant's attorney returned to his office and as of this time has been unable to contact Defendant and does not know of his where abouts; however, Defendant's wife did call long distance and stated that he had gone to visit her mother in North Carolina and would return to Atlanta and work with Defendant's attorney that night and that she knew where some of the files were but she did not know where Defendant was nor how to get in touch with him except that he said he was going fishing and would be back Wednesday night or Thursday.

Defendant's attorney does not have the full file, is not able to properly, without the file, draft the request to

charge, is not prepared to proceed to trial at this time and does not believe he can properly defend under the conditions as they exist without the assistance of Defendant.

Defendant's attorney did not enter the case (which has been in progress almost four years) until November of 1982 and needs additional time to review the very large number of documents and depositions in the file. Most of Defendant's attorney's time has been spent in appellate matters and while Defendant's attorney is familiar with that part of the case he is not fully acquainted with the evidence and documents in the file.

Further, after Defendant was notified of the stay granted by the Court of Appeals he instructed his secretary to release all of his witnesses and did not attempt to obtain any other witnesses to

testify as would be necessary in the case.

Conclusion

Based upon the facts as they exist, a continuance in this case should be granted until Defendant's attorney has the file and records necessary to prepare the case for trial and in order that Defendant will have an opportunity to appear and assist his attorney at the trial and Defendant's attorney will have an opportunity to prepare an orderly defense based upon the file as has been accumulated. Defendant's attorney had planned to work all Saturday and Sunday in preparation for trial on June 13, 1983, but when the Stay was granted by the Court of Appeals Defendant and his attorney did not anticipate a trial during the week of June 13th. For this reason Defendant's attorney did not object that Defendant wanted to take the

files with him. For Defendant to be forced to trial under the conditions as they exist denies to him equal protection of the law and due process of the law all as is guaranteed by the United States and Georgia Constitutions and also denies to him a fair and impartial trial with the right to defend his cause in person and with effective assistance of counsel as is guaranteed by the Georgia and United States Constitutions.

Dated this 14th day of June.

s/
FLETCHER THOMPSON
Attorney for Defendant

GG-1

COURT OF APPEALS OF GEORGIA

Atlanta, March 30, 1967

WHOLE COURT: ORDER

On motion made by Judge Hall the following was passed unanimously:

It is the opinion of all nine judges of this court sitting en banc that the filing of a notice of appeal in a non-criminal case automatically operates as a supersedeas, upon payment of all costs in the trial court by the appellant. Section 8, Appellate Practice Act of 1965. This order effective February 9, 1967.